

Jurisdictional Rope-a-Dope: Fraud Enforcement at the Boards of Contract Appeals

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The federal procurement landscape is layered with enforcement mechanisms and initiatives designed to prevent and detect fraud, waste, and abuse, or what is commonly referred to as "procurement fraud." The government's primary enforcer, the Department of Justice (DOJ), has a number of tools for combating

procurement fraud, most notably the civil False Claims Act (FCA). While fighting fraud and corruption has been a public policy initiative for decades, the future promises heightened enforcement, with the Air Force's recent execution of a Memorandum of Understanding to target acquisition fraud and corruption¹ and a report from the Government Accountability Office calling for the Department of Defense to more thoroughly assess and report department-wide fraud risks.² Moreover, the defense industry is gearing up for an influx of fraud enforcement actions arising out of the end of the war in Afghanistan.³

One area where contractors face the risk of encountering government fraud enforcement is in the disputes process. The FAR's "Disputes" clause is the contractual mechanism for resolving disputes. If the parties cannot resolve their issues, the contractor must turn to the procedures established by the Contract Disputes Act of 1978 (CDA),⁴ which involves submission of a written claim followed by an appeal, either to one of the Boards of Contract Appeals (BCAs) or to the U.S. Court of Federal Claims (COFC). The vast majority of contract claims are appealed to the BCAs, which were established to afford contractors avenues with a less expensive and expeditious resolution of claims.

Fraud is generally excluded from the disputes process—most of the formal civil fraud process takes place in federal district courts. However, fraud enforcement has seeped its way into the contract disputes system, typically in the form of government counterclaims for fraud or potential forfeiture remedies associated with fraud at the COFC. Through a series of often intricate and

inconsistent decisions, fraud has also migrated into claim appeals at the BCAs, despite the CDA's legislative history indicating Congress's intent to exclude fraud from the BCAs' jurisdiction.⁵ In this regard, a contractor's choice of forum has meaningful consequences. Appeals filed at the COFC bring with them the risk of the DOJ asserting a counterclaim alleging fraud under a variety of statutes, including the FCA⁶ and the CDA's antifraud provisions.⁷ Appeals filed at the BCAs—where most appeals are filed—are subject to a more complicated analysis as to whether the appeal may proceed in light of the Agency's belief or suspicion of fraud, depending on how and when the fraud is alleged.

This article examines how the BCAs have addressed allegations and evidence of fraud in claim appeals. First, this article reviews the CDA antifraud provisions and their corresponding FAR provisions. Second, this article analyzes the BCAs' jurisdiction to consider appeals where the contracting officer (CO) declined to issue a final decision on the basis of suspected fraud. Third, this article analyzes the BCAs' jurisdiction to consider appeals where the CO issues a final decision despite a suspicion of fraud. Finally, this article considers under what circumstances the BCAs retain jurisdiction over appeals in which the government raises fraud as an affirmative defense.

Statutory and Regulatory Language

Contract Disputes Act Appeal Procedures

The CDA requires that "[a]ll claims by a contractor against the government relating to a contract shall be . . . submitted to the contracting officer for a decision."⁸ After receipt of a contractor's certified claim, "[a] contracting officer shall, within 60 days of receipt . . . (A) issue a decision;⁹ or (B) notify the contractor of the time within which a decision will be issued."¹⁰ A "[f]ailure by a contracting officer to issue a decision on a claim within the required time period is deemed to be a decision by the contracting officer denying the claim and authorizes an appeal or action on the claim. . . ."¹¹

The contractor may appeal the CO's final decision (COFD) to the appropriate BCA within 90 days of receipt, or to the COFC within 12 months of receipt.¹² The contractor holds the right to select the forum (subject to the timeliness requirements).¹³ Given that the government may raise a counterclaim of fraud at the COFC, a contractor who is suspicious of the government's intent may instead select the relevant BCA, where the government does not have the same rights due to the jurisdictional limitations of the BCAs, thereby potentially limiting the government's litigation options.

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CDA Antifraud Provisions

The CDA contains four limitations on the requirement that the contracting officer issue a decision when the claim involves fraud, collectively referred to as the “antifraud” provisions.¹⁴ First, the requirement that claims must be submitted within six years of accrual does not apply to a “claim by the Federal Government against a contractor that is based on a claim by the contractor involving fraud.”¹⁵ Second, the requirement that the contracting officer issue a decision does not apply to “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.”¹⁶ This limitation is for claims that arise pursuant to statutes such as the FCA, which DOJ has sole authority to administer. Third, if it is determined that the contractor’s claim is based upon misrepresentations of fact or fraud, the government may recover the amounts determined to be unsupported.¹⁷ DOJ is charged with bringing claims based upon this provision.¹⁸ Fourth, and typically the most relevant, the requirement to issue a decision does not authorize an agency head to “settle, compromise, pay, or otherwise adjust any claim involving fraud.”¹⁹

Federal Acquisition Regulation Subpart 33.2

The FAR implements the CDA antifraud provisions in FAR 33.209, which addresses *suspected* fraudulent claims, provided that “[i]f the contractor is unable to support any part of the claim and there is evidence that the inability is attributable to misrepresentation of fact or to fraud on the part of the contractor, the contracting officer shall refer the matter to the agency official responsible for investigating fraud.” FAR 33.210 gives the contracting officer authority “to decide or resolve all claims arising under or relating to a contract subject to the [CDA].” However, that authority 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.²⁰

CO Declines to Issue Final Decision Due to Suspected Fraud

On one hand, the CDA does not authorize an agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud. Those matters are left up to the DOJ. On the other hand, FAR 33.210 provides the CO with authority “to decide or resolve all claims arising under or relating to a contract subject to the [CDA].” In light of these rights and limitations, how is a CO required to treat a claim in which he or she suspects fraud? FAR 33.209 provides some guidance—it requires the CO to refer the matter to the agency official responsible for investigating fraud where there is “evidence” that the unsupported part of the claim is premised on a “misrepresentation of fact or fraud.” However, the more difficult

question surrounds the CO’s authority to “decide” or “resolve” claims where the CO believes that there is some evidence of fraud. The BCA decisions appear to consider a variety of factors in determining the extent of the CO’s authority: whether there is suspicion of fraud in the claim itself, whether fraud is suspected elsewhere in the performance of the contract, whether an investigation is already underway at the time of the jurisdictional challenge, and whether the Board took jurisdiction over the appeal before the CO alleged fraud.

Suspicion of Fraud in the Claim Submission

The Civilian Board of Contract Appeals (CBCA) has examined a CO’s authority to adjudicate claims where the CO believed there was evidence of fraud in the claim submission. *Savannah River*²¹ involved submission of a certified claim requesting a COFD interpreting the contract as to the allowability of the disputed costs under a specific contract clause. Prior to the submission of the contractor’s claim, DOJ notified the contractor of an impending FCA action against it. While the

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claim was with the CO, DOJ filed the FCA suit against the contractor. Thereafter, the CO issued a letter to the contractor, indicating that he suspected that costs in the claim were fraudulent, had referred the matter to the relevant agency officials, and lacked authority to issue a COFD. The contractor filed its appeal at the CBCA on a deemed denial basis. In granting the government’s motion to dismiss for lack of jurisdiction, the CBCA held that the CO was *not authorized* to issue a final decision and had complied with the regulation in not issuing a final decision because he “suspected the costs were fraudulent.”²² Moreover, the CBCA held there could not be a deemed denial of a claim where the CO was without jurisdiction to issue a final decision.²³

The CBCA recently clarified its ruling in *Savannah River*, emphasizing that the timing of the government’s

enforcement action was critical to the question of jurisdiction. In *Widescope Consulting & Contracting Services*,²⁴ the contractor appealed to the Board on a deemed denial basis after the CO failed to issue a decision on its claim. Thereafter, the CO concluded that there was a misrepresentation of fact or fraud on the claim, determined he was “without authority to decide the claim,” and proceeded to notify the contractor that “a decision would not be forthcoming on its claim.” The government, relying on *Savannah River*, moved to dismiss, maintaining that the Board lacked jurisdiction to hear the appeal because the CO did not issue a final decision on the contractor’s claim due to suspected fraud. In denying the motion, the CBCA noted that the difference hinged on the

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fact that, at the time the jurisdictional motion was presented in *Savannah River*, DOJ had already filed a fraud action in the U.S. district court. By contrast, in *Widescope*, no similar action had been filed and the CO’s “mere suspicion” of fraud on the claim was insufficient to defeat jurisdiction. The CBCA concluded that because the CO had not been divested of the authority to issue a decision on the claim, and *because the CO could have decided it*, the appeal was properly before the Board on the basis of a deemed denial.

Thus, as it currently stands, the CBCA will dismiss a claim filed on a deemed denial basis where fraud is suspected, but only if DOJ has filed a corresponding fraud action at the time of the request for dismissal. However, if a CO refuses to issue a final decision due to suspected fraud, the Board will retain jurisdiction over an appeal from a deemed denial if no parallel fraud action is pending.

Suspicion of Fraud in Performance of the Contract

The Armed Services Board of Contract Appeals (ASBCA) recently addressed the situation in which a CO refuses to issue a COFD due to suspected fraud *in the*

performance of the contract (rather than fraud in the actual claim itself), thus highlighting a critical distinction as it relates to the Board’s jurisdiction to consider the appeal. In *Tetra Tech EC, Inc.*,²⁵ Tetra Tech and the Navy entered into a contract that contemplated the award of task orders for survey and possible radiological remediation. During Tetra Tech’s performance of various task orders, the government alleged that the contractor had misrepresented soil sample surveys. Ultimately, two Tetra Tech site workers pleaded guilty to falsifying soil sample results. Meanwhile, the government also disputed the accuracy of Tetra Tech’s investigation of radiological contamination and accordingly assigned Tetra Tech a negative Contractor Performance Assessment Reporting System (CPARS) rating. Tetra Tech challenged the CPARS rating in claims to the CO, asserting that the Navy violated FAR section 42.1503(b)(1) by rating the contractor on issues outside of the firm’s performance of the contract. However, the CO refused to issue a final decision on the basis that there were elements of fraud that divested her of authority to do so.

Specifically, the CO noted that litigation alleging violations of the FCA arising from Tetra Tech’s radiological remediation work was pending. After Tetra Tech appealed to the ASBCA on a deemed denial basis, the government moved to dismiss the appeal for lack of jurisdiction, arguing that the CO had no authority to decide Tetra Tech’s claims, which the government alleged could not be separated from its fraud. Moreover, the government asserted that there could be no deemed denial of a claim when a CO is divested of authority to issue a final decision.

In denying the government’s motion, the Board held that it had the jurisdiction to “consider claims when there are allegations of fraud in the contract, so long as there are not allegations of fraud in the claim itself, and [the Board] need not make factual findings of fraud.”²⁶ The Board further noted, citing recent decisions, that the CDA jurisdictional prohibition applies to fraud related to the claim and does not apply to fraud believed to be involved somewhere else, such as the formation or performance of the contract. The Board held:

So long as the suspected fraud is not intertwined with the basis for the claim and we are not required to make factual determinations of fraud, the contracting officer’s assertion that he or she lacks authority to issue a final decision does not act to divest us of jurisdiction.²⁷

Here, the Board determined that Tetra Tech’s alleged fraud—falsifying sampling and survey results—should not be an issue in determining whether the Navy complied with the contract requirements and regulations concerning performance evaluations. As will be relevant in the discussion below of the government’s affirmative defense of fraud, *Tetra Tech* shows that a Board will retain jurisdiction over claims not requiring a factual determination of fraud.

CO's After-the-Fact Assertion of Fraud

The BCAs have been steadfast: “[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.”²⁸ Thus, once a CO issues a COFD on some *contractual* basis (even if fraud is suspected), or if the CO fails to issue a COFD and the contractor appeals on a deemed denial basis (but says nothing about suspected fraud), the BCAs are vested with jurisdiction and the CO cannot divest it through unilateral action. This has been addressed in a number of recent cases where the CO has tried to do exactly that—assert a suspicion of fraud *after* the Board has taken jurisdiction.

*Nauset Construction Corp.*²⁹ involved a contractor’s appeal on a deemed denial basis of its claim for additional payment under a terminated construction contract. Thereafter, the CO issued a letter determining she had no authority to decide the claims because they involved fraud. The CO concluded that the claimed costs were “fraudulent or false” because Nauset had been under investigation by several federal agencies.³⁰ In denying the government’s motion to dismiss, the Board held that whether the claims *involved* fraud was not operative to resolve the jurisdictional matter before it, but rather the Board found the essential fact was that two claims were presented to the CO and she declined to issue a decision on those claims.³¹ The Board, in essence, concluded that whether there was fraud was irrelevant—the contractor appealed based on the CO’s continual delays in deciding its claims, and the CO’s later decision that she could not decide Nauset’s claims could not retroactively remove jurisdiction from the Board.³²

*Mountain Movers/Ainsworth-Benning, LLC*³³ involved another attempt by a CO to retroactively invalidate a COFD based on contractual issues based on a later suspicion of fraud. Approximately two months after a contractor’s timely appeal, the CO rescinded his final decision after discovering purportedly fraudulent statements made by the contractor years earlier. The government moved to dismiss claims for lack of jurisdiction based on the CO’s rescission of the COFD. In denying the government’s motion, the ASBCA noted that (1) the COFD found partial merit in the contractor’s claim and therefore it was not based on fraud, and the ASBCA retains jurisdiction over a COFD that resolves a claim on a basis *other than fraud*; (2) the COFD could not have been based on fraud because the CO contended he was unaware of the purported fraud at the time he issued his final decision; and (3) once the ASBCA obtained jurisdiction over the appeal, the CO could not divest the Board of jurisdiction by issuing a new decision purporting to rescind the prior one.³⁴

Should a CO Issue a Decision Despite a Suspicion of Fraud?

The aforementioned cases (with the exception of *Mountain Movers*) involve situations where the CO declined to issue a COFD due to perceived evidence of fraud,

either in the claim or elsewhere in the performance of the contract. But where does that instruction come from? In a concurring opinion in *Widescope*, Judge Marian E. Sullivan analyzed the propriety of a CO’s refusal to issue a final decision over suspected fraud, writing that although the Board has noted that the phrases from the FAR “authority to decide” and “any claim involving fraud” suggest a prohibition on the CO from issuing *any* decision, this limitation would conflict with the CDA requirement that a CO issue a decision on all claims submitted.³⁵ Rather, Judge Sullivan wrote that FAR 33.210 “can be read narrowly to eliminate a contracting officer’s ability to issue a decision that does anything more than deny a claim involving fraud (i.e., settles, compromises, pays, or otherwise adjusts a claim).”³⁶

Beyond the conflict between the CDA and the FAR, Judge Sullivan noted the reasoning in *Savannah River*, where the CO refused to issue a decision, creates the possibility that a CO will *never* act upon a claim, allowing the claim to stall indefinitely, which would be “an untenable result, given the administrative review mechanism of the CDA.”³⁷ Although the COs in both *Widescope* and *Savannah River* properly referred the suspected fraud per the instructions of FAR 33.209, Judge Sullivan noted that the rationale in *Savannah River* would still prevent a CO from issuing a decision. Rather, “[t]he contracting officer had an *obligation* to issue a decision on the claim, despite the suspicion that it involved fraud, and the contracting officer had the *authority to deny the claim*.”³⁸

In sum, whether the Board will maintain jurisdiction over a deemed denial, where the CO has declined to issue a final decision, involves a fact-intensive inquiry. If the CO does not issue a COFD on the basis of suspected fraud *in the claim*, the Board will maintain jurisdiction of an appeal on a deemed denial basis (*Widescope*), unless DOJ had previously initiated a fraud action (*Savannah River*). Similarly, if the CO does not issue a COFD on the basis of suspected fraud *in the performance* of the contract (not the claim), the Boards will maintain jurisdiction over the claim so long as it need not make factual findings of fraud to decide the claim (*Tetra Tech*). Finally, the ASBCA will maintain jurisdiction over a valid appeal from a COFD or a deemed denial where the CO, who said nothing prior to the appeal, subsequently tries to assert that he had no authority to decide the claim because of suspected fraud (*Nauset Construction*), or where the CO tries to rescind the COFD for the same reason (*Mountain Movers*). In those instances, where no suspected fraud is raised by the CO until after the Boards have taken jurisdiction, the CO cannot divest the Boards of jurisdiction—however, as discussed below, the government may use other means to defeat jurisdiction through the assertion of affirmative defenses of fraud.

CO Issues Final Decision Even Where There Is Evidence of Fraud in the Claim

Where the CO suspects fraud in the claim and proceeds

to issue a final decision, another series of decisions have arisen with respect to the Board's jurisdiction. The Federal Circuit has long held that a contracting officer's final decision is *not* automatically invalid even if the CO cites fraud as a ground upon which to terminate a contract or deny a contractor's claim. In *Daff v. United States*, the contractor filed suit seeking the payment of convenience termination costs.³⁹ The government alleged as an affirmative defense that the contractor's claims were barred by fraud and illegality, and then asserted a counterclaim for unliquidated progress payments under the contract and a second counterclaim under the FCA.⁴⁰

Following a trial on the merits, the COFC awarded unliquidated damages to the government and imposed upon the contractor a civil penalty and treble damages under the FCA.⁴¹ On appeal, the contractor argued that the court lacked jurisdiction over both its claims and the government's counterclaims because the CO lacked the

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authority to issue a termination decision based upon allegations of fraud.⁴² The Federal Circuit, however, determined that the court had jurisdiction, explaining that the CO "stated two separate and distinct reasons for the default termination": (1) delivery by the contractor of defective hardware "as a result of solderers who worked on the contract not having received 'the minimum required level of training,'" thereby resulting in a failure on the part of the contractor to perform in accordance with the requirements of the contract, and (2) alleged falsification by the contractor of required records related to the certification of the solderers.⁴³

Rather than justify contract termination based solely upon fraud grounds, the contracting officer "set forth a ground for the termination that the contracting officer was authorized to assert, *i.e.*, failure to perform according to the terms of the contract."⁴⁴ Thus, while the CO discussed fraud as a ground for default termination, the CO ultimately set forth a separate reason based wholly upon

the contract itself, for the default termination. As such, the contracting officer issued a valid termination decision.

In *Green Dream Group*,⁴⁵ the appellant claimed costs after the contract—for training Iraqi nationals and road-building in Iraq—was terminated for convenience shortly after award. After the contractor submitted its termination settlement proposal, the CO issued a COFD allowing certain costs but denying others as false claims. The Board ultimately awarded appellant \$925,214 plus interest for equipment rental despite the government's allegations that appellant had falsified invoices that were submitted both to the contracting officer and to the Board as evidence.⁴⁶ The Board held that it could not consider the government's allegations because "[w]e lack jurisdiction over whether appellant submitted false documents in support of its claim."

By taking jurisdiction in this manner, the Board resolved the challenge to authenticity of invoices in appellant's favor while avoiding a direct ruling on the authenticity of the invoices.⁴⁷ While the government also raised fraud as an affirmative defense, the Board's decision never addressed the government's argument. Earlier, the Board had denied the government's motion to dismiss the appeals for lack of jurisdiction, where the government had asserted that appellant was not the same party that signed the contract.⁴⁸ Although the Board addressed the parties' arguments regarding the English uses of the appellant's name, the Board did not address the evidentiary issue that the corporate name in Arabic on the document proffered as appellant's certificate of incorporation was not the same Arabic name (*i.e.*, not the same Arabic words) as the Arabic corporate name on the subcontracts submitted with the claim.⁴⁹

Recent BCA cases have also distinguished between a COFD denying a claim for multiple reasons, including suspected fraud. In *Protec GmbH*,⁵⁰ the CO issued a COFD addressing the contractor's claims regarding CPARS evaluations and unpaid invoices, correcting one error in the CPARS evaluation but otherwise denying the claims. The COFD did not state that it was denying the claim based upon a suspicion of fraud, or even mention fraud or false statements. The government moved to dismiss for lack of jurisdiction on the basis that the CO lacked authority to issue the final decision because the CO knew that appellant was under investigation for fraud at the time the COFD was issued. The government pointed to an earlier email from the contracting officer's representative (COR) to the CO raising concerns that Protec had (1) invoiced for work not performed; (2) utilized unauthorized and unqualified personnel, and misrepresented that qualified personnel performed the work; and (3) submitted supporting documents that contained false information.

Moreover, the COR also reported his suspicions to the Army Criminal Investigation Command (CID), who forwarded its findings to the CID Major Procurement Fraud Unit. The government represented to the Board that the

criminal fraud investigation was active. The ASBCA denied the government's jurisdictional challenge, finding that the COFD was grounded "exclusively in disputed contract issues . . . [and was] not based upon—let alone solely based upon—a suspicion of fraud. . . ." The ASBCA further confirmed that a COFD is only invalid if it is based *solely* upon a suspicion of fraud.⁵¹ Unlike in *Daff*, the ASBCA noted that, at most, the COFDs could be read as citing facts similar to those in the report relied upon in the CID report. However, the Board held that "[t]he mere fact that there is an ongoing criminal investigation which encompasses events which were the basis for the contracting officer's decision being appealed is not enough to divest us of jurisdiction."⁵²

The ASBCA revisited this topic in *Sand Point Servs., LLC*,⁵³ where a CO issued COFD stating *in part* that claims for different site conditions and constructive change appeared fraudulent, but also set forth contractual reasons for denying the claims. However, the CO did not refer the matter to the agency official for investigation. In denying the government's jurisdictional challenge, the ASBCA held that the CO's assertion that the claims involved fraud was undermined by the CO's failure to refer the matter for investigation.⁵⁴ Further, the COFD was not based solely upon a suspicion of fraud, nor did the Board have to make factual determinations of fraud to resolve these appeals; that is, the Board did not have to determine whether any incorrect statements were made knowingly and with the intent to deceive.⁵⁵

Government Affirmative Defenses Involving Fraud

Once a contractor has appealed a valid COFD denying its claim to either the Boards or the COFC, the government may raise fraud as an affirmative defense or as a government counterclaim. However, the viability of the government's fraud allegations depends in part on the forum selected by the contractor and the source of the facts supporting the fraud.

Although it is generally understood that the BCAs do not have jurisdiction of affirmative government claims of fraud, the ASBCA will nonetheless take jurisdiction of government *affirmative defenses* of fraud in certain circumstances. Thus, pleading an affirmative defense of fraud, *per se*, does not require the Board to dismiss, rather than decide, an appeal.⁵⁶ Such an option permits the government to defend against appeals by asserting that the contractor has committed fraud in the formation or performance of the contract, or in the contractor's preparation and submission of its claim.

Fraud Determined by Court of Competent Jurisdiction

Where the government has asserted an affirmative defense of fraud based on the finding of another tribunal, i.e., a court of competent jurisdiction, the ASBCA will maintain jurisdiction over the appeal. In these scenarios, the ASBCA takes the position that it does not have to make any factual findings of fraud, but rather can

rely on the findings of another court to deny the claim. The Federal Circuit reviewed the ASBCA's jurisdiction over an affirmative defense of fraud in *Laguna Construction Co. v. Carter*.⁵⁷ Laguna Construction Company was awarded a government contract in 2003 to perform work in Iraq. After completion, Laguna sought reimbursement of past costs, a portion of which the government denied. Laguna sued the government for these costs at the ASBCA. Notably, during the pendency of its appeal, Laguna's project manager pleaded guilty to conspiracy to pay or receive kickbacks in violation of 18 U.S.C. § 371, to conspiracy to defraud the United States, and to violations of 41 U.S.C. § 53 (now codified at 41 U.S.C. § 8702), the Anti-Kickback Act.⁵⁸ Following the guilty plea, the Board permitted the government to amend its answer to add the affirmative defense of fraud.⁵⁹

The Federal Circuit held on appeal that, consistent with Board precedent,⁶⁰ where the Board lacks jurisdiction over the underlying fraud actions—here an Anti-Kickback Act claim—the Board can maintain jurisdiction over a separate affirmative defense involving that fraud, as long as it avoids factual determinations regarding the underlying fraud.⁶¹ Here, the project manager's criminal conviction established the element of fraud. Therefore, the Federal Circuit held that the Board properly exercised jurisdiction over the government's affirmative defense. Subsequently, the ASBCA has denied government affirmative defenses of fraud that *lack* a finding of fraud by another court.⁶²

Fraud in Contract Formation—Void ab Initio

The Boards have also maintained jurisdiction over appeals where the government raised an affirmative defense that a contract was void due to fraud in contract formation, i.e., void ab initio. In such instances, the Board has maintained that where the contract was procured by fraud, it never existed in the first place and thus no claims can be filed under it.

In *International Oil Trading Co.*,⁶³ International Oil Trading Co. (IOTC) appealed from the denial of claims for fuel delivered to the government in Iraq under two contracts. The government asserted an affirmative defense of fraud alleging that IOTC principals had bribed the head of a Jordanian intelligence agency "to assure that IOTC would not have effective competition for the contracts."⁶⁴ The government maintained that "[t]he contracts were obtained by and tainted by bribery and fraud, and hence are void ab initio and IOTC cannot recover on its claims."⁶⁵ IOTC moved to strike the government's defense, suggesting that the CDA barred the Board from entertaining the government's defense. The Board disagreed, concluding that the Board's statutory bar to considering fraud claims did not extend to an affirmative defense that the contract is void ab initio under the common law for taint of fraud or bribery in its formation.⁶⁶

During the pendency of the dispute, the Federal Circuit issued *Laguna*.⁶⁷ IOTC then filed a new motion

contending that *Laguna* abrogated the Board's prior ruling by forbidding the Board from deciding the facts relevant to the defense. However, the Board denied the motion, stating that "*Laguna* did not purport to recalibrate the legal landscape and abrogate the Board's prior ruling here permitting the government's affirmative defense to proceed."⁶⁸ In addition, the Board noted that "*Laguna* said nothing to restrict the Board's power to determine the validity of a contract when the government alleges that it is void ab initio due to fraud or bribery in its acquisition."⁶⁹

The federal contracting community closely follows the ASBCA fraud decisions in order to understand how the ASBCA determines when a contract was procured via fraud. On one hand, the ASBCA has relied on the convictions from a court of competent jurisdiction.⁷⁰ However, where there is no prior court conviction to rely upon, the ASBCA has resorted to various standards of proof of fraud to find the contract void.⁷¹

Fraud in Preparation of Claim or Performance of Contract


The ASBCA will allow the government to assert an affirmative defense of fraud in the claim or in the performance of the contract, despite having no clear proof of the fraud. In *Environmental Safety Consultants, Inc.*,⁷² the ASBCA denied a contractor's motion to dismiss a government affirmative defense of fraud in which the government alleged that the contractor had intentionally commingled contract costs with claimed amounts. Although the ASBCA acknowledged it had no jurisdiction over criminal or civil fraud, the Board retained jurisdiction on the basis that "[t]he allegation of fraud in this appeal is not a Government claim asserted as the Government's own right, but a response which raises a defense to appellant's claim for a quantum recovery."⁷³ The ASBCA further held that "[t]he Government's defense places in issue the amount of out-of-pocket expenses and legal obligations to appellant's subcontractors, suppliers, employees or others that could constitute recoverable costs" and was thus relevant to the merits of the contractor's claim.⁷⁴ Thus, the Board here remained willing to consider the authenticity of the evidentiary support for amounts claimed, in a way the Board would not in its later decisions in *Green Dream Group*.

In *AAA Engineering & Drafting, Inc.*,⁷⁵ the ASBCA retained jurisdiction over an affirmative defense where there was no evidence of fraud in the inception of the contract, but evidence of fraud perpetrated during its performance. The ASBCA adopted its prior holding that

Movant's primary contention is that the termination claim submitted by Nexus . . . is fraudulent and, therefore, we have no jurisdiction to entertain this appeal. This contention is incorrect. We clearly have jurisdiction under the [CDA] . . . to decide the dispute concerning appellant's entitlement to termination costs. . . . That fraud may have been practiced in the course of negotiations for settlement of those costs . . . does not deprive us of jurisdiction under the CDA.⁷⁶

Ultimately, the Board held that the government's defense of fraud was valid and denied the appeals on grounds of public policy—that a contractor should not receive an equitable adjustment under a contract tainted by fraud. A series of ASBCA cases have similarly retained jurisdiction over a government affirmative defense asserting fraud.⁷⁷

Conclusion

These cases show that issues of fraud present a particular challenge for the BCAs and COs alike. The ASBCA faces this issue more frequently, likely due to the increased opportunities for fraud with foreign appellants who, as a practical matter, operate largely outside of U.S. fraud jurisdiction.⁷⁸ The international aspect of these overseas claims also presents special evidentiary challenges, such as difficulties in revisiting locations, collecting documents, and locating witnesses; documents that require translation; and witnesses who may not be able to be deposed or testify without an interpreter. However, even acknowledging these challenges, there remains considerable uncertainty—and, indeed, inconsistency—in the BCAs' decisions about jurisdiction and fraud. At this point, Congress should step in and clarify and align both the obligations of a CO who identifies some evidence of fraud as well as the BCAs' jurisdiction to consider that evidence. At the very least, the government—who is guarding taxpayer dollars—should be on equal footing with the appellant. 

Endnotes

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4. Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (codified at 41 U.S.C. §§ 7101 to 7109).
5. *Martin J. Simko Constr., Inc. v. United States*, 852 F.2d 540, 543-45 (Fed. Cir. 1988).
6. 31 U.S.C. §§ 3729-3733.
7. 41 U.S.C. § 7103.
8. *Id.* § 7103(a)(1)-(2).
9. In the decision, the CO "shall state the reasons for the decision reached" and inform the contractor of its appeal rights. *Id.* § 7103(e). The CO is not required to make specific findings of fact. *Id.*
10. *Id.* § 7103(f)(2).
11. *Id.* § 7103(f)(5).
12. *Id.* § 7104(a)-(b)(1)
13. See *Bonneville Assocs. v. United States*, 43 F.3d 649, 653 (Fed. Cir. 1994).

14. 41 U.S.C. § 7103.
15. *Id.* § 7103(a)(4)(B).
16. *Id.* § 7103(a)(5).
17. *Id.* § 7103(c)(2).
18. *Widescope Consulting & Contracting Servs. v. Dep't of Health & Human Servs.*, CBCA 6895, 2021 WL 1590347 (Apr. 16, 2021) (citing *Martin J. Simko Constr., Inc. v. United States*, 852 F.2d 540, 545 (Fed. Cir. 1988)).
19. 41 U.S.C. § 7103(c)(1) (emphasis added).
20. *See Widescope Consulting & Contracting Servs.*, 2021 WL 1590347 (noting that paragraph b was promulgated in its current form in 1986 “to emphasize the limitations on the contracting officer’s authority in the settlement of claims involving fraud,” 51 Fed. Reg. 36,970, 36,972 (Oct. 16, 1986), whereas the original version of FAR 33.210(b), promulgated in the initial version of the FAR, read: “A claim involving fraud.” 48 Fed. Reg. 42,102, 42,350 (Sept. 19, 1983)).
21. *Savannah River Nuclear Sols., LLC v. Dep't of Energy*, CBCA 5287, 17-1 BCA ¶ 36,749, at 179,114.
22. *Id.*
23. Notably, the contractor argued that the CO *could have* issued a final decision on the contractual issue as to the allowability of the costs claimed, despite the fraud allegations, in accordance with the Federal Circuit’s decision in *Daff v. United States*, 78 F.3d 1566, 1570 (Fed. Cir. 1996). *Savannah River*, 17-1 BCA ¶ 36,749, at 179,116. However, the Board declined to entertain such an argument on the basis of facts that did not occur. *Id.*
24. *Widescope Consulting & Contracting Servs.*, CBCA 6895, 2021 WL 1590347.
25. ASBCA No. 62449, 2021 WL 3418608.
26. *Id.* at 184,053.
27. *Id.*
28. *Mountain Movers/Ainsworth-Benning, LLC*, ASBCA No. 62164, 20-1 B.C.A. (CCH) ¶ 37,664, at 182,864.
29. *Nauset Constr. Corp.*, ASBCA No. 61673, 21-1 B.C.A. (CCH) ¶ 37,852.
30. *Id.* at 183,815.
31. *Id.* at 183,816.
32. *Id.*; *see also ESA South, Inc.*, ASBCA No. 62242, 20-1 B.C.A. (CCH) ¶ 37,647 (holding the CO’s after-the-fact letter did not divest the Board of jurisdiction where the CO did not assert claim prior to appeal on deemed denial basis).
33. *Mountain Movers/Ainsworth-Benning, LLC*, 20-1 B.C.A. (CCH) ¶ 37,664, at 182,864.
34. *Id.*; *see also GSC Constr., Inc.*, ASBCA No. 62530, 21-1 B.C.A. (CCH) ¶ 37,809 (CO declaration in support of government’s motion to dismiss asserting potential fraud in claim insufficient to defeat jurisdiction where ASBCA only needs to determine contractual issues to decide claim).
35. *Widescope Consulting & Contracting Servs.*, CBCA 6895, 2021 WL 1590347 (“In the face of such a conflict, the FAR provision cannot stand.”).
36. *Id.* at 10 (noting that such an interpretation reconciles the FAR clause with the CDA requirement that the contracting officer issue a decision on a properly presented claim).
37. *Id.*
38. *Id.* at 11 (emphasis added).
39. 78 F.3d 1566, 1570 (Fed. Cir. 1996).
40. *Id.*
41. *Id.* at 1570–71.
42. *Id.*
43. *Id.* at 1572.
44. *Id.*
45. ASBCA No. 57413 et al., 13 BCA ¶ 35,272.
46. Appellant claimed that the invoices—in Arabic—were copies of originals in its possession. However, two alleged copies of the “same” invoice were different in that the copy submitted with the claim was undated, but the receipt appellant submitted

to the Board had acquired a date. *Compare* Rule 4, Tab 19a, with ASBCA No. 57565, Appellant’s Rule 4 File, Tab 7; *see also* Gov’t Post-Hearing Brief at 35. The government also argued that there were several other indicia that the invoices had been fabricated. *See generally* Gov’t Post-Hearing Brief. Finally, the government argued that the Arabic corporate name on the alleged subcontractor contracts was not the same name, in Arabic, as the name of the company in its alleged certificate of incorporation. *Id.* at 34–36; *see also* Gov’t Motion to Dismiss at 12–14; *id.*, Exh. 22 at 1, 3, 5, 7, 15–17, and compare with *id.* Exhs. 28, 29. Appellant stated that it was unable to produce an original version of any document. *See* Gov’t Post-Hearing Brief at 33 n.18.

47. In the same decision, however, the Board denied Green Dream’s claim for security costs allegedly provided by one local sheikh, relying on a statement from a second sheikh that he had provided security *gratis*. *Green Dream Grp.*, 13 BCA ¶ 35,272, at 173,144. The government argued that this claim was also fraudulent, in part because appellant “has no evidence that [the first sheikh] exists.” Gov’t Post-Hearing Brief at 33. The CO had denied the security claim on the basis that it was “a possible false claim or false receipt actionable under US Law.” ASBCA No. 57413, Rule 4 File, tab 9. The Board accepted the second sheikh’s declaration that appellant never incurred security costs but side-stepped the COFD that the claim for security costs was apparently fraudulent *and* the government’s argument that appellant had submitted a falsified contract for security as evidence to the CO and the Board.

48. *Green Dream Grp.*, ASBCA No. 57413 et al., 12-2 BCA ¶ 35,145.

49. For an excellent in-depth examination of the *Green Dream* decision, read Major Elinor J. Kim, *Why “Green Dreams” Should Not Come True: Keeping Boards of Contract Appeals Off the Scales of Justice*, 224 MIL. LAW REV. 1073 (2016).

50. ASBCA No. 61161 et al., 18-1 BCA ¶ 37,010.

51. *Id.* at 180,244 (citing *Daff v. United States*, 78 F.3d 1566, 1572 (Fed. Cir. 1996)); *see also Medina Constr., Ltd. v. United States*, 43 Fed. Cl. 537, 555–56 (1999) (COFC determined that a COFD was unauthorized and invalid because the final decision was based upon an “unsubstantiated suspicion” that the contractor had submitted fraudulent invoices).

52. *Id.* at 180,245 (citing *Fleischzentrale Sudwest GmbH*, ASBCA No. 37273, 89-3 BCA ¶ 21,956, at 110,444).

53. ASBCA Nos. 61819, 61820, 19-1 BCA ¶ 37,412, at 181,859.

54. *Id.*

55. *Id.* (citing *SIA Constr.*, 14-1 BCA ¶ 35,762, at 174,984).

56. *Erka Constr. Co.*, ASBCA No. 57618, 12-2 B.C.A. (CCH) ¶ 35129.

57. 828 F.3d 1364, 1368 (Fed. Cir. 2016).

58. *Id.* (Mr. Salinas admitted that from April 2005 to March 2008, he worked with subcontractors to submit inflated invoices to Laguna for reimbursement by the government and profited from the overpayment. Additionally, in February 2012, a federal grand jury in the District of New Mexico issued a criminal indictment against three principal officers of Laguna, alleging that they received kickbacks for awarding subcontracts. The executive vice president and chief operating officer of Laguna also pleaded guilty to conspiring to defraud the United States and pleaded guilty.)

59. Notably, the Federal Circuit held that the Board had jurisdiction even though the government’s defense was never presented to a CO, explaining that “the government’s defense plainly does not seek the payment of money or the adjustment or interpretation of contract terms.” *Id.*

60. In affirming the Board’s decision, the Federal Circuit first noted that certain fraud-related claims are outside of the Board’s jurisdiction. *Martin J. Simko Constr., Inc. v. United States*, 852 F.2d 540, 545–48 (Fed. Cir. 1988). These include claims relating to 41 U.S.C. § 7103 (formerly 41 U.S.C. § 604), 28 U.S.C.

§ 2514 (Special Plea in Fraud), and 31 U.S.C. §§ 3729–3731 (False Claims Act). *Id.* The government’s affirmative defense of prior material breach does not fall into any of these categories.

61. *See, e.g.*, Appeals of AAA Eng’g & Drafting, Inc., ASBCA No. 48729, 01-1 BCA ¶ 31,256, 2001 WL 66652 (finding jurisdiction where the government alleged fraud in contract administration, and the Tenth Circuit had already determined that AAA had committed fraud); Turner Constr. Co. v. Gen. Servs. Admin., GSBCA No. 15502, 05-2 BCA ¶ 33,118, 2005 WL 2789442 (holding that the Board did not have jurisdiction over the government’s affirmative defense of prior breach because the Board would have to find fraudulent conduct).

62. Supply & Serv. Team GmbH, ASBCA No. 59630, 17-1 BCA ¶ 36,678 (Contractor sought reimbursement of government offsets taken after the contractor had allegedly submitted invoices for services not provided, or that were inflated. The government advanced an affirmative defense that the Board characterized as material breach based upon fraud. Citing *Laguna*, the Board found the defense unsustainable without a third-party factual determination.); Erka Constr. Co., ASBCA No. 57618, 12-2 B.C.A. (CCH) ¶ 35,129 (Aug. 16, 2012).

63. ASBCA No. 57491 et al., 18-1 BCA ¶ 36,985.

64. *Id.* at 180,144.

65. *Id.*

66. *Id.*

67. 828 F.3d 1364, 1368 (Fed. Cir. 2016).

68. *Id.*

69. *Id.*; *see also* ABS Dev. Corp., ASBCA Nos. 60022, 60023, 17-1 BCA ¶ 36,842, at 179,522 (“There is a big difference between whether a contract is void *ab initio* (in which the question is whether the contractor can establish that he has a contract with the government in the first place, and whether (as in *Laguna*) the

government is asserting the type of fraud claim that we do not possess jurisdiction to entertain.”).

70. Atlas Int’l Trading Corp., ASBCA No. 59091, 15-1 B.C.A. (CCH) ¶ 35,830 (finding contract void *ab initio* based on conviction of contractor’s bribery of the government’s program manager); Dongbuk R&U Eng’g Co., ASBCA No. 58300, 13-1 BCA ¶ 35,389, 2013 WL 4511644 (a Korean court had convicted the president of the contractor of the crime of misrepresentation in its proposal to the government).

71. *See, e.g.*, C & D Constr., Inc., ASBCA No. 38661, 90-3 BCA ¶ 23,256, at 116,683; Servicios y Obras Isetan S.L., ASBCA No. 57584, 13-1 BCA ¶ 35,279, at 173,162.

72. ASBCA No. 53485, 02-2 BCA ¶ 31904, 2002 WL 1402367.

73. *Id.* at 157,613.

74. *Id.*

75. ASBCA No. 47940, 01-1 BCA ¶ 31,256, 2001 WL 66652.

76. *Id.* at 154,366 (citing Anlagen-und Sanierungstechnik, GmbH, ASBCA No. 37878, 91-3 BCA ¶ 24,128, at 120,753).

77. Env’t Sys., Inc., ASBCA No. 53283, 03-1 BCA ¶ 32167, 2003 WL 169975 (holding that the Board had jurisdiction over an affirmative defense that the submission of false progress payment requests was a material breach of contract justifying a default termination); United Techs. Corp., ASBCA No. 46880, 95-2 BCA ¶ 27,644, 1995 WL 247818 (retaining jurisdiction over an affirmative defense that the contracts were tainted by a violation of a conflict-of-interest statute in a contractor’s claim that the government had improperly canceled its engine contracts).

78. DOJ’s limited resources are unlikely to be dedicated to pursuing extradition of an individual who submitted an allegedly fraudulent claim to a DOD contracting officer, and in many countries where the U.S. military has or had a presence, such as Afghanistan and Kuwait, there is no extradition treaty with the United States.