



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

**THIS OPINION WAS INITIALLY ISSUED UNDER SEAL AND IS BEING
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MOTION TO DISMISS DENIED: March 17, 2021

CBCA 6895

WIDESCOPE CONSULTING AND CONTRACTING SERVICES,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

George E. Stewart and Hal J. Perloff of Husch Blackwell LLP, Washington, DC, counsel for Appellant.

Tami S. Hagberg and Terrius D. Greene, Office of the General Counsel, Department of Health and Human Services, Washington, DC, counsel for Respondent.

Before Judges **KULLBERG**, **SULLIVAN** (presiding), and **O'ROURKE**.

Opinion for the Board by Board Judge **O'ROURKE**. Board Judge **SULLIVAN** concurs.

The Department of Health and Human Services (HHS) executed a contract with Widescope Consulting and Contracting Services (Widescope) to provide project management support to the Defense Information Systems Agency (DISA). After the contract ended, Widescope filed a claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), seeking payment of its last two invoices on the contract. Widescope appealed to the Board the asserted deemed denial of that claim.

HHS has moved to dismiss the appeal for lack of jurisdiction on two bases. One, HHS argues that, because Widescope filed its appeal before the date established for the issuance of the final decision, Widescope's claim is premature. Two, the contracting officer concluded that Widescope was "unable to support aspects" of its claim and that inability was evidence of "misrepresentation of fact or fraud on the part of" Widescope. Because of this suspected fraud, the contracting officer determined that he had no authority to issue a decision. Without a contracting officer's decision on its claim, HHS asserts that the Board lacks jurisdiction over Widescope's appeal. Because there are factual differences between this appeal and a prior Board decision upon which HHS relies, we deny HHS's motion.

Background

I. Contract Terms and Final Invoices

In August 2018, HHS executed a contract with Widescope to provide subject matter expertise and project management support for a project for DISA. Appellant's Opposition to Respondent's Motion to Dismiss, Exhibit A at 1-2. The contract term was for one year, with the option for a second year. *Id.* Widescope was to be paid a firm-fixed price of \$1.2 million for work in accordance with the technical requirements of the performance of work statement. *Id.* at 3.

In July 2019, HHS notified Widescope that the option year would not be exercised on the contract. Appellant's Brief, Exhibit C, ¶ 6. Following this notice, Widescope submitted two invoices to HHS, one dated July 1, 2019, and the other dated July 29, 2019, both in the amount of \$269,885.58. *Id.*, Exhibit I.

II. Claim Submission

By letter dated June 5, 2020, Widescope submitted a claim seeking payment of its two invoices, in an amount totaling \$539,771.16. Notice of Appeal, Claim at 1-2. In addition, Widescope sought Prompt Payment Act interest in the amount of \$10,400.06. *Id.* Widescope provided the required certification of its claim. *Id.*

In an email dated July 23, 2020, counsel for HHS acknowledged receipt of the claim and advised that the contracting officer would issue a decision by August 4 (sixty days from receipt of the claim) or provide a date by which a decision would be issued. Appellant's Brief, Exhibit M. In a subsequent email dated August 4, 2020, counsel advised that the contracting officer would issue a decision "no later than September 18, 2020." *Id.* Counsel noted that the contracting organization "has been working to substantiate the receipt and acceptance of goods and services associated" with the contract. *Id.* Counsel recited the

security requirements of the contract and requested, on behalf of the contracting organization, that “Widescope submit additional documentation to support its claim.” *Id.* Widescope provided additional documents in response to this request on August 7 and 10. Respondent’s Brief, Exhibit 3 at 5-8.

On August 7, 2020, Widescope filed its appeal with the Board, noting that the contracting officer had not issued a decision on its claim and that Widescope considered its claim to be deemed denied. Notice of Appeal.

III. Contracting Officer’s Determination and HHS’ Motion

The contracting officer reviewed the claim and other material submitted by Widescope and concluded that there was a misrepresentation of fact or fraud on the claim. Respondent’s Motion, Exhibit 1, ¶ 20. Having reached this conclusion, the contracting officer determined that he was “without authority to decide the claim and that the claim therefore must be [REDACTED] *Id.* ¶ 21. The contracting officer, thereafter, [REDACTED] on September 10, 2020, notified Widescope that “a decision would not be forthcoming on its claim [REDACTED] *Id.* ¶¶ 22, 23. HHS filed its motion to dismiss for lack of jurisdiction on September 14, 2020.

In its reply brief, HHS advises that, on October 19, 2020, the [REDACTED]

[REDACTED] Respondent’s Reply Brief at 4 n.1. On October 21, 2020, [REDACTED]

Appellant’s Sur-Reply Brief at 2-3.

[REDACTED] the contracting officer, as the designee for the Assistant Secretary for Administration, notified Widescope on October 22, 2020, that he “lacks the authority to act on Widescope’s claim in accordance with FAR 33.210(b) for the same reasons stated in his September 10 referral notice.” *Id.* In light of the contracting officer’s determination, no decision was issued on Widescope’s claim.

In its motion, HHS maintains that the Board lacks jurisdiction to hear the appeal because the contracting officer did not issue a final decision on Widescope's claim. HHS argues that without a contracting officer's final decision, Widescope's claim is premature and fails to meet the CDA's requirements for a finding of jurisdiction.

Discussion

I. Widescope's Appeal is not Premature

When provided with a claim for more than \$100,000, the contracting officer has sixty days to issue a decision or notify the contractor when a decision will be issued. 41 U.S.C. § 7103(f)(2). An appeal filed before the date the contracting officer's decision is due is premature and the Board will dismiss it on this basis, particularly if the time for the contracting officer to issue the decision has not run. *Primestar Construction v. Department of Homeland Security*, CBCA 5510, 17-1 BCA ¶ 36,612 (2016). However, "a premature appeal to the Board can ripen into maturity if the premature appeal is still pending when the contracting officer actually issues a decision or when the contracting officer's deadline for issuing the decision expires." *Id.* (citing *TRW, Inc.*, ASBCA 51172, et al., 99-2 BCA ¶ 30,407. Such a circumstance occurs when, as here, the contracting officer has announced that he will not issue a decision. *TRW, Inc.* In this circumstance, "no useful purpose would be served by dismissing the appeal as premature and requiring appellant to refile." *R.W. Electronics Corp.*, ASBCA 46592, et al., 95-1 BCA ¶ 27,327 (1994).

Widescope filed its appeal prior to the date that the contracting officer set to issue the decision on Widescope's claim. But, when the agency extended the deadline for its decision by another forty-five days, sixty days from the date of Widescope's claim submission had already elapsed. Subsequently, the contracting officer stated twice that no decision would be issued. Because no useful purpose would be served by dismissing the appeal as premature given the contracting officer twice stated refusal to issue a decision, we do not dismiss Widescope's appeal as premature.

II. The Contracting Officer had Authority to Issue a Decision

"[A] final decision by a [contracting officer] on a 'claim' is a prerequisite for Board jurisdiction." *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc). The contracting officer's decision can be either an actual decision or "deemed denial" of the claim. 41 U.S.C. § 7103(f). If the contracting officer lacks authority to issue a decision, the contracting officer's decision cannot confer jurisdiction on the Board. *Case, Inc. v. United States*, 88 F.3d 1004, 1009 (Fed. Cir. 1996). Moreover, "when a contracting officer lacks

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authority to issue a final decision on a claim, there cannot be a valid deemed denial of the claim so as to confer CDA jurisdiction.” *Id.*

The contracting officer asserted that he lacked authority to issue a decision pursuant to 48 CFR 33.210(b) (2020) (FAR 33.210(b)). FAR 33.210 provides the contracting officer with authority “to decide or resolve all claims arising under or relating to a contract subject to the [CDA].” However, that “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. HHS relies upon our decision in *Savannah River Nuclear Solutions, LLC v. Department of Energy*, CBCA 5287, 17-1 BCA ¶ 36,749, in which we interpreted this FAR provision to eliminate the authority of the contracting officer to issue a decision on a claim involving fraud. The Board held, “[a] contracting officer’s final decision denying a claim based on suspected fraud is not valid, as the contracting officer lacks the authority to decide a claim when fraud is suspected.” *Id.* Based upon this lack of authority, the Board found that it lacked jurisdiction over the deemed denial of a claim.

This case is factually distinguishable from our decision in *Savannah River*. In that case, at the time the jurisdictional motion was presented, the Department of Justice (DOJ) had already filed a fraud action in district court. Here, [REDACTED]

[REDACTED] The contracting officer, as expressed in his letter of September 10th, and reiterated in his October 22nd, letter, has only a suspicion of fraud on the claim. Under the circumstances here, mere suspicion is insufficient to defeat a finding of jurisdiction. *See ESA South, Inc.*, ASBCA 62242, 20-1 BCA ¶ 37,647 (rejecting agency’s claim that contracting officer’s suspicion of fraud could divest the Board of jurisdiction (citing *Todd Shipyards Corp.*, ASBCA 31092, 88-1 BCA ¶ 20,509, and *PROTEC GmbH*, ASBCA 61161, et al., 18-1 BCA ¶ 37,010)).

For these reasons, we find that the contracting officer has not been divested of the authority to issue a decision on the claim, and because he could have decided it, the appeal is properly before us on the basis of a deemed denial.

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Decision

HHS's motion is **DENIED**.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

I concur:

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

SULLIVAN, Board Judge, concurring.

I concur in the result. Because I find that the Board's prior decision in *Savannah River* is controlling but incorrectly decided, I write separately.

The facts of *Savannah River* do not provide a basis for distinguishing that decision from the present appeal.¹ The contractor submitted a claim, seeking a decision on the allowability of costs that had been withheld based upon a specific provision of the contract. Prior to submission of the claim, the Department of Justice (DOJ) notified the contractor that a False Claims Act suit would be filed and, after the claim was submitted, filed that suit. In a letter, the contracting officer notified the contractor that the costs that were the subject of its claim were referred to the agency's inspector general and DOJ, pursuant to FAR 33.209, "because our office suspected the costs were fraudulent." Then, citing FAR 33.210(b), the contracting officer stated, "I have no authority to take action on the above claim." The contractor appealed to the Board on the basis that its claim had been "deemed denied." Respondent, the Department of Energy, filed a motion to dismiss for lack of jurisdiction,

¹ The distinguishing facts identified in the panel opinion would factor into the Board's consideration of a motion to stay the appeal pending a fraud investigation. *See, e.g., TDC Management Corp.*, DOT CAB 1802, 88-1 BCA ¶ 20,242 (1987).

asserting that there had been no contracting officer decision or deemed denial, thereby depriving the Board of jurisdiction over the appeal.

The Board determined that “[a] contracting officer’s final decision denying a claim based on suspected fraud is not valid, as the contracting officer lacks the authority to decide a claim when fraud is suspected.” We further held that “the contracting officer complied with the regulation and did not issue a final decision, as he did not have the authority to issue a final decision. Instead, as required by regulation, he referred it [to] the agency official responsible for investigating the fraud.” Relying upon *Case, Inc. v. United States*, 88 F.3d 1004, 1009 (Fed. Cir. 1996), and a series of cases involving 28 U.S.C. § 516, the Board also determined that the decision could not be deemed denied because the contracting officer was “divested of authority to issue a final decision.” Without a decision or a deemed denial, the Board determined it lacked jurisdiction and dismissed the appeal.

This holding—that a contracting officer lacks authority pursuant to FAR 33.210(b) to issue a decision on a claim involving fraud—is incorrect based upon the requirements of the CDA. While the scope of a contracting officer’s authority is limited on claims involving fraud, it is incorrect to hold that the contracting officer can take no action, thereby allowing claims to stall for an indeterminate period with no action before the agency.

Requirements of the CDA

A contracting officer is required to issue a written decision on a claim submitted by a contractor. 41 U.S.C. § 7103(a)(3), (d). In the decision, the contracting officer “shall state the reasons for the decision reached” and inform the contractor of its appeal rights. *Id.* § 7103(e). The contracting officer is not required to make specific findings of fact. *Id.* For claims for amounts greater than \$100,000, the contracting officer shall, within sixty days of receipt, issue a decision or notify the contractor when a decision will be issued. *Id.* § 7103(f)(2). If the contracting officer fails to issue the decision within the required time period, it will be “deemed the decision by the contracting officer denying the claim” and the contractor may proceed to appeal the decision. *Id.* § 7103(f)(5).

The CDA contains four limits on the requirement that the contracting officer issue a decision when the claim involves fraud, three of which are relevant to this analysis.² First, 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

² The fourth limitation is the requirement that claims 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.” 41 U.S.C. § 7103(a)(4)(B).

agency is specifically authorized to administer, settle, or determine.” 41 U.S.C. § 7103(a)(5). This limitation is for claims that arise pursuant to statutes such as the False Claims Act, which DOJ has sole authority to administer. Second, if it is determined that the contractor’s claim is based upon misrepresentations of fact or fraud, the Federal Government may recover the amounts determined to be unsupported. *Id.* § 7103(c)(2). DOJ is charged with bringing claims based upon this provision. *Martin J. Simko Construction, Inc. v. United States*, 852 F.2d 540, 545 (Fed. Cir. 1988). Third, and 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.” *Id.* § 7103(c)(1). An agency head is different from the contracting officer. *Joseph Morton Co. v. United States*, 757 F.2d 1273, 1280-81 (Fed. Cir. 1985).

None of these provisions eliminates the obligation of the contracting officer to issue a decision on a claim, even if it involves fraud. Pursuant to § 7103(c)(1), the limitations on an agency head to not “settle, compromise, pay, or otherwise adjust a claim involving fraud,” do not include “decide” or “deny.” *See Hardrives, Inc.*, IBCA 2511, et al., 91-2 BCA ¶ 23,769 (“such denials of contractor’s claims do not constitute settling, compromising, paying, or otherwise adjusting any claim involving fraud”); *see also International Oil Trading Co.*, ASBCA 57491, et al., 13 BCA ¶ 35,393 (distinction between actions to settle, compromise, pay, or otherwise adjust a claim and a decision denying a claim). Moreover, Congress did not include “decide” and “deny” in this list, although those terms are used in other parts of the same provision. Based upon this absence, we may conclude that Congress did not intend that the agency was to be precluded from denying a claim or issuing a decision, although that decision may simply be a denial. *See Joseph Morton Co.*, 757 F.2d at 1280-81 (use of different terms within the provisions of the CDA indicates that the terms have different meanings). If Congress, in drafting this provision, wanted to preclude all action by an agency or a contracting officer once the agency suspected fraud on a claim, it simply could have said so in the statute. *See Hardrives* (noting that the CDA does not eliminate the jurisdiction of the boards of contract appeals when a claim involves fraud). The CDA does not contain such a limitation.

The analysis of the United States Court of Appeals for the Federal Circuit in *Bath Iron Works Corp. v. United States*, 20 F.3d 1567 (Fed. Cir. 1994), is instructive. In that case, the agency was precluded from granting the claim based upon a statutory provision that barred the payment of any claim that arose more than eighteen months before it was submitted. *Id.* at 1571. The Government asserted on appeal that the trial court lacked jurisdiction, arguing that, because the contracting officer could not grant the relief requested due to statutory limitations, the contracting officer could not issue a decision. *Id.* at 1578. The Court rejected the argument:

The fact that the [contracting officer] was statutorily required to deny the untimely claim does not mean that the [contracting officer] did not make a decision. It merely means he made a negative decision denying the claim. We note that the government cites no authority whatsoever supporting its assertion that in order to constitute a “decision” under the CDA, the [contracting officer] must have authority to *grant* a claim.

Id. at 1579. The Court drew a distinction between the statutory limitation at issue and 28 U.S.C. §§ 516–520, which gives DOJ exclusive authority over a matter once a claim is in litigation and eliminates the contracting officer’s authority to issue a decision. *Id.* “No analogous statutory provision in this case which divests the [contracting officer] of authority to decide the claim merely because he may be statutorily required to deny it. . . . The fact that the [contracting officer] may have been required by [statute] to deny the claim does not mean that he did not decide it.” *Id.* This analysis applies in this case. Although a contracting officer may not be able to grant or otherwise settle a claim involving fraud, the CDA does not eliminate the contracting officer’s obligation to issue a decision.

Requirements of FAR 33.210

Turning to the regulation at issue, FAR 33.210 provides the contracting officer with 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.

FAR 33.210. 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. 36970, 36972 (Oct. 16, 1986).³

The phrases “authority to decide” and “any claim involving fraud” do suggest a prohibition on issuing any decision. However, such a limitation would conflict with the

³ The original version of FAR 33.210(b) promulgated in the initial version of the FAR read: “A claim involving fraud.” 48 Fed. Reg. 42102, 42350 (Sept. 19, 1983).

CDA requirement that a contracting officer issue a decision on all claims submitted. In the face of such a conflict, the FAR provision cannot stand. *See Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854, 859 (Fed. Cir. 1997); *Rig Masters, Inc. v. United States*, 42 Fed. Cl. 369, 372-73 (1998). Alternatively, the FAR clause 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). Such an interpretation reconciles the FAR clause with the CDA requirement that the contracting officer issue a decision on a properly presented claim.

In addition to creating a conflict between the CDA and the FAR, the reasoning in *Savannah River* creates the possibility that a contracting officer will never act upon a claim, an untenable result, given the administrative review mechanism of the CDA. If a contracting officer suspects fraud, he or she is required to refer the matter to DOJ or investigative authorities within the agency, as was done by the contracting officers in both this case and *Savannah River*. FAR 33.209. But, what happens if that investigation never proceeds or, as happened in this case, the investigative body within the agency sends the matter back to the contracting organization? Under the rationale in *Savannah River*, the contracting officer remains unable to issue a decision because the contracting officer still suspects that the claim involves fraud. Nothing in the CDA suggests that Congress intended such a result.

Cases relied upon in *Savannah River*

In deciding *Savannah River*, we relied upon Court of Federal Claims decisions that do not support our holding. *Medina Construction, Ltd. v. United States*, 43 Fed. Cl. 537 (1999), involves a strange procedural history and is properly limited to its facts. As for *Newtech Research Systems LLC v. United States*, 99 Fed. Cl. 193 (2011), we relied upon a portion of the decision that is dicta. In *Newtech*, the court found that FAR 33.210 did not apply to the facts presented.

Jurisdiction of the boards of contract appeals to decide appeals of claims involving fraud

The presence of suspected fraud in a claim does not deprive the Board of jurisdiction to hear an appeal. *See, e.g., Fidelity Construction Co.*, DOT CAB 1113, et al., 80-2 BCA ¶ 14,819. Instead, the boards have found jurisdiction to decide the non-fraud aspects of claims presented while the fraud claims were decided by another tribunal:

The resolution of rights under the contract and the determination of whether or not fraud exists in the preparation of the claim for equitable adjustment are two different matters, vested by law in different tribunals, and with ample safeguards to preclude any unjust enrichment by a contractor.

Id. This approach is rooted in the legislative history of the CDA, which described dual tracks for such claims—fraud claims would be decided in a court of competent jurisdiction, while the non-fraud aspects of the claims would proceed before the boards:

If such [fraud] cases do arise and are thus handled in the courts, other parts of the claim not associated with possible fraud or misrepresentation of fact will continue on in the agency board or in the Court of Claims where the claim originated.

S. Rep. No. 95-1118, at 20 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5254. It simply does not make sense that the boards would have jurisdiction to consider appeals on claims involving fraud if the contracting officer is without authority to decide the claims underlying those appeals, the predicate for the Board's jurisdiction.

Based upon this analysis, I would hold that the Board has jurisdiction on the basis of a deemed denial of Widescope's claim. The 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.

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge