



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED IN PART FOR LACK OF JURISDICTION; DENIED IN PART:
September 9, 2024

CBCA 8002

MLU SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Allison G. Geewax of Smith Currie Oles LLP, Tysons, VA; and Lochlin B. Samples of Smith Currie Oles LLP, Atlanta, GA, counsel for Appellant.

Andrew Michael Thabo Hickey, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER**, **RUSSELL**, and **SULLIVAN**.

LESTER, Board Judge.

Appellant, MLU Services, Inc. (MLU), has appealed a decision of a contracting officer for the Federal Emergency Management Agency (FEMA) that both denies a monetary claim that MLU submitted and asserts a government claim. The FEMA contracting officer denied MLU's claim challenging FEMA's non-payment of five invoices (only three of which MLU is pursuing in this appeal) that MLU alleges, but FEMA denies, MLU had previously submitted for payment. The FEMA contracting officer also asserted a government claim under the anti-fraud provision of the Contract Disputes Act (CDA), 41 U.S.C. § 7103(c)(2) (2018) (section 7103(c)(2)), seeking penalties on the unsupported part (allegedly the entirety)

of MLU's monetary claim, plus reimbursement of FEMA's costs incurred in reviewing MLU's claim.

Addressing MLU's monetary claim, FEMA filed a motion seeking summary judgment in its favor because, before MLU submitted its claim, MLU had not submitted its invoices for payment in the manner that its task orders required, meaning that FEMA's obligation to process and pay those invoices had never accrued. Because MLU does not dispute that it did not formally submit the invoices to FEMA for payment in conformance with the contract's required process and because MLU provides no evidentiary support for its allegation that FEMA informally agreed to change the contractually required method for the formal submission of invoices, FEMA is entitled to summary judgment on MLU's claim challenging FEMA's non-payment. MLU's more recent submission of the invoices to FEMA in accordance with the contract requirements, which occurred after MLU submitted its certified claim, is not properly before us, and our decision here does not preclude MLU, outside of the context of this appeal, from pursuing payment on invoices that it properly submitted after submitting its certified claim.

Addressing FEMA's monetary claim, which seeks penalties under section 7103(c)(2) arising out of MLU's alleged fraud, MLU requests that we "strike" that claim because the contracting officer did not possess authority to have issued a final decision asserting the government claim. MLU is correct that contracting officers lack authority to issue CDA decisions seeking recovery under section 7103(c)(2), meaning that the FEMA contracting officer's decision purporting to do so is void and unenforceable. We reject FEMA's argument that, because the Board lacks authority to consider fraud, the contracting officer's decision imposing penalties under section 7103(c)(2) is essentially unappealable and untouchable. Instead, we find that, because the contracting officer's decision asserting an affirmative monetary claim under section 7103(c)(2) is void, there is no valid decision asserting the purported government claim upon which to base jurisdiction of MLU's appeal of that claim.¹

Background

I. The Terms of Task Orders 18, 43, and 55

On April 3, 2018, FEMA awarded contract 70FB8018D00000013, known as the "Logistics Housing Operations Unit Installation Maintenance and Deactivation"

¹ We similarly lack jurisdiction to entertain additional monetary demands that FEMA included in an addendum to its answer because the contracting officer never asserted entitlement to those costs in the contracting officer's final decision on appeal.

(LOGHOUSE) contract, to MLU. Appeal File, Exhibit 2 at 582, 643.² The LOGHOUSE contract was an indefinite-delivery/indefinite-quantity contract with a cost ceiling of \$730 million that was intended to support FEMA's manufactured housing unit mission. *Id.* at 583. Under this contract, MLU subsequently competed for and was awarded several task orders, three of which are relevant to this appeal:

First, on November 30, 2018, FEMA awarded task order 18 to MLU to transport and install temporary housing units to assist in responding to California wildfires, with a ceiling amount of \$21,975,778. Exhibit 7 at 1342-43; *see* Complaint ¶ 11; Answer ¶ 11. The task order provided that “[i]nvoices shall be submitted to the following: FEMA FINANCE: [FEMA Finance Center Vendor Payment Address]@fema.dhs.gov.” Exhibit 7 at 1343.

Second, on May 7, 2019, FEMA awarded task order 43 to MLU for the same type of services being provided under task order 18, with a ceiling amount of \$53,299,894.40. Exhibit 15 at 1471-72. Like task order 18, task order 43 provided that “[i]nvoices shall be submitted to the following: FEMA FINANCE: [FEMA Finance Center Vendor Payment Address]@fema.dhs.gov.” *Id.* at 1472.

Third, on July 8, 2019, FEMA awarded task order 55 to MLU for additional mobile housing unit transport and installation services in response to the California wildfires, with a task order ceiling amount of \$17,302,435. Exhibit 26 at 1564-65. Like task orders 18 and 43, task order 55 provided that “[i]nvoices shall be submitted to the following: FEMA FINANCE: [FEMA Finance Center Vendor Payment Address]@fema.dhs.gov.” *Id.* at 1565.

Task orders 18, 43, and 55 contained identical language describing where and how MLU was to submit invoices:

B.3 BILLING INSTRUCTIONS (JUN 2014)

Contractors will use Standard Form 1034 (Public Voucher for Purchases and Services Other Than Personal) located at <http://www.gsa.gov/portal/forms/type/SF> when submitting a payment request. A payment request means any invoice or request for contract financing payment requesting reimbursement for supplies or services rendered. The Contractor can submit weekly invoice payments.

² Unless otherwise noted, all exhibits referenced in this decision are found in the appeal file.

Contractors must submit vouchers electronically in pdf format to the FEMA Finance Center at [FEMA Finance Center Vendor Payment Address]@fema.dhs.gov. A copy of the voucher must be submitted electronically to the contracting officer identified within this contract. The submission of vouchers electronically will reduce correspondence and other causes for delay to a minimum and will facilitate prompt payment to the Contractor. Paper vouchers mailed to the finance center will not be processed for payment. If the Contractor is unable to submit a payment request in electronic form, the contractor shall submit the payment request using a method mutually agreed to by the Contractor, the Contracting Officer, and the payment office.

Exhibits 7 at 1346, 15 at 1474, 26 at 1577 (emphasis added).

The task orders also incorporated the clause at Federal Acquisition Regulation (FAR) 52.212-4 (Jan 2017) (48 CFR 52.212-4 (2018)), which provided that “[t]he Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and prompt payment regulations at 5 CFR Part 1315.” Exhibit 2 at 988.

II. The Parties’ Process for Submitting Draft Invoices for Review

The parties agree that, during contract performance, they established a process (outside the terms of the contract) whereby MLU would submit “draft invoice copies” to Mohamad Elmahmoud, the contracting officer’s representative (COR) for at least two of the task orders³ (to whom MLU refers as the contract’s “Quality Assurance Specialist”), for review and comment before MLU would formally submit them for payment. Complaint ¶ 14; see Answer ¶ 14; Declaration of Charles Fradella (May 31, 2024) ¶ 5; Declaration of Mohamad Elmahmoud (June 14, 2024). As Mr. Elmahmoud acknowledges, he “agreed to perform courtesy reviews of [MLU’s] draft invoices.” Elmahmoud Declaration ¶ 4. Following receipt, Mr. Elmahmoud “would review the invoices and backup prior to [MLU’s] formal submission in an effort to address any issues upfront.” Complaint ¶ 14; see Answer

³ Although task orders 18, 43, and 55 originally identified individuals other than Mr. Elmahmoud as the CORs, FEMA issued modifications to task orders 43 and 55 on August 8, 2019, substituting Mr. Elmahmoud as the primary COR. Exhibits 35 at 1615, 36 at 1616. For task order 18, Mr. Elmahmoud was designated as the alternate COR (rather than the primary COR) through a task order modification issued on December 18, 2018. Exhibit 8 at 1368. We see nothing in the record showing that Mr. Elmahmoud was ever reassigned to become the primary COR for task order 18. Mr. Elmahmoud also never became the contracting officer for any of the task orders.

¶ 14. After Mr. Elmahmoud’s approval, MLU would submit the invoice to FEMA Finance, using the submission procedures required by the contract. Fradella Declaration ¶ 6; Complaint ¶ 15.

This process is reflected in the parties’ handling of one of the invoices that was originally the subject of MLU’s certified claim but is no longer in dispute in this appeal. On or before September 9, 2019, Mr. Fradella, who was MLU’s field finance accountant during the performance of the task orders, Fradella Declaration ¶ 3, sent Mr. Elmahmoud a copy of invoice GRID-CA-008, which identified a total invoice amount of \$1,341,366. *See* Exhibits 38 at 1624, 1626, 39. On September 9, 2019, Mr. Elmahmoud informed Mr. Fradella of necessary changes to the invoice; Mr. Fradella sent Mr. Elmahmoud additional information later that day; Mr. Elmahmoud responded on September 9 and 12, 2019, with additional concerns; and Mr. Fradella responded that he would “restructure, revise, and resubmit.” Exhibit 43 at 1637; *see* Exhibits 39, 40, 41, 42. Mr. Fradella resubmitted the invoice on September 13, providing Mr. Elmahmoud with written answers to each of his questions. Exhibit 44 at 1638. On December 12, 2019, Mr. Elmahmoud sent Mr. Fradella more suggestions for and questions about the invoice, Exhibit 47 at 1685, and Mr. Fradella responded by email later that day with “responses . . . in red,” one of which indicated that MLU was reducing the invoice amount to \$1,010,200 to comport with a task order line item ceiling. Exhibit 51. After additional exchanges between Mr. Elmahmoud and Mr. Fradella, *see* Exhibit 48 at 1690, Mr. Elmahmoud informed Mr. Fradella on January 7, 2020, that, “[p]er [the contracting officer], the below response is acceptable. You may submit for payment.” Exhibit 51 at 1779. Mr. Fradella then formally submitted the invoice (accompanied by a SF 1034) to the FEMA Finance Center email address required in the task orders, with a copy to Mr. Elmahmoud, for payment of \$1,010,200, Exhibit 50 at 1774-78, which the FEMA Finance Center paid. Exhibit 81 at 2511.

III. Submission to and Review by the COR of the Invoices in Dispute

MLU alleges that, in July 2019, Mr. Elmahmoud informed it that FEMA was beginning an audit of MLU’s invoices and would not be processing any future invoice submissions until the audit was complete. Fradella Declaration ¶ 7. In his declaration, Mr. Fradella asserts that, as a result of this information, MLU “paused formal submission of pending invoices to FEMA finance as we understand from Mohamad Elmahmoud that they would not be processed.” *Id.* ¶ 8. The record contains no evidence, either documentary or testimonial, that Mr. Elmahmoud or anyone else at FEMA told Mr. Fradella that MLU was barred from submitting invoices. Although FEMA disputes MLU’s allegations, we need not resolve that factual dispute to resolve the motions pending before us. After learning of the audit, MLU continued to submit “draft invoice copies,” as MLU calls them in its complaint

(Complaint ¶ 14), to Mr. Elmahmoud for review.⁴ That leads us to the three invoices for which MLU is seeking payment in this appeal.

Invoice 4407-CA-010. MLU submitted invoice 4407-CA-010, which identified a payment request amount of \$703,230 under task order 18, to Mr. Elmahmoud sometime between September 26 and December 6, 2019. *See* Respondent’s Addendum ¶ 8; Appellant’s Answer to Addendum ¶ 8.⁵ Mr. Elmahmoud responded on December 10, 2019, with requests for additional information and documentation. Exhibit 70 at 2196; Respondent’s Addendum ¶ 10; Appellant’s Answer to Addendum ¶ 10. In response to a September 29, 2020, email from Mr. Fradella concerning invoice 4407-CA-010, Mr. Elmahmoud responded that “FEMA will need all back up documentation as [previously] requested.” Exhibit 70 at 2196. Mr. Fradella, in turn, replied that MLU was “putting the back up together now.” *Id.*

⁴ In its response to FEMA’s motion for summary judgment, MLU argues that “the invoices that are the subject of this dispute were submitted in 2019 and 2020, *before* the Government’s extensive audit of the Project,” Appellant’s Opposition to Motion for Summary Judgment at 4 (emphasis added), and that it was not until “late 2019” that FEMA “notified MLU that it would not process, pay, review, or otherwise negotiate invoices until an audit was performed.” *Id.* at 1-2. Yet, Mr. Fradella states in his declaration that he learned of the audit and its implications in July 2019. Fradella Declaration ¶ 7. Unsupported statements of counsel in MLU’s brief, in conflict with the evidence that MLU has submitted, do not provide a basis for creating factual issues that would preclude summary judgment. *See J.G. Watts Construction Co. v. United States*, 161 Ct. Cl. 801, 808 (1963) (“Statements made by counsel in briefs are not normally accepted by the [tribunal] as being part of the factual record.”).

⁵ In its addendum to its answer, FEMA alleges that MLU emailed the invoice to Mr. Elmahmoud for a courtesy review on September 26, 2019, Respondent’s Addendum ¶ 8, but, in response, MLU admits only “that it submitted the indicated invoice, which speaks for itself,” without identifying a specific submission date. Appellant’s Answer to Addendum ¶ 8. We cannot locate any documentary evidence in the record showing an invoice submission on September 26, 2019. The documentary evidence suggests that, although the invoice is dated September 26, Mr. Fradella actually hand-delivered it, along with other invoices, to Mr. Elmahmoud’s office when he visited there in early December 2019, Exhibits 45 at 1648, 1652, 52 at 1783, followed by an email to Mr. Elmahmoud on December 10, 2019, providing an SF 1034 to accompany the invoice. Exhibit 46 at 1655, 1666. For purposes of this decision, the specific date in late 2019 on which Mr. Fradella provided the invoice to Mr. Elmahmoud is unimportant. The parties agree that MLU delivered invoice 4407-CA-010 to Mr. Elmahmoud at some point between September and December 2019.

Invoice 4407-CA-012. MLU emailed invoice 4407-CA-012, which identified a payment request amount of \$709,976.16 under task order 18, to Mr. Elmahmoud “on or about January 2020.” Respondent’s Addendum ¶ 12; *see* Appellant’s Answer to Addendum ¶ 12. Mr. Elmahmoud responded to Mr. Fradella through two emails sent on January 17, 2020, indicating that “[w]e have completed our review” of the invoice, asking some questions about it and identifying missing documentation. Exhibit 53 at 1789; *see* Exhibit 54 at 1862. In response, Mr. Fradella submitted a corrected spreadsheet to Mr. Elmahmoud on February 24, 2020. Exhibit 56 at 1872. On March 9, 2020, Mr. Elmahmoud notified Mr. Fradella that “[a]fter performing our unofficial c[o]urtesy/preliminary review” of the invoice, “the review team found what appears to be multiple discrepancies on [it]” after comparing contract line items, an emergency call log, and the backup documentation that MLU provided. Exhibit 57 at 1980-81. Then, on or about June 25, 2020, Mr. Elmahmoud received a Federal Express package from MLU containing “preliminary invoice . . . 4407-CA-012 . . . along with backup documentation,” which, as Mr. Elmahmoud informed Mr. Fradella by email, would be “the 3rd courtesy review that FEMA COR team has undertaken.” Exhibit 67 at 2045. In an email dated June 25, 2020, Mr. Elmahmoud identified a series of “[i]ssues to re-address.” *Id.* By email to Mr. Elmahmoud dated September 29, 2020, Mr. Fradella provided a “corrected summary/spreadsheet” for the invoice. Exhibit 68 at 2084. Mr. Elmahmoud responded later that day, indicating that the issues identified in the prior email were “still applicable.” Exhibit 69 at 2124.

Invoice GRHI-CA-010. MLU delivered invoice GRHI-CA-010, which identified a payment request amount of \$81,837.98 under task order 55, to Mr. Elmahmoud in early December 2019. *See* Exhibits 45 at 1648-54, 52 at 1783; Respondent’s Addendum ¶ 19; Appellant’s Answer to Addendum ¶ 19. On December 18, 2019, Mr. Elmahmoud emailed Mr. Fradella with a list of issues that he and his team had identified with the invoice. Exhibit 52 at 1783. He and Mr. Fradella engaged in an email dialogue from December 18, 2019, through March 4, 2020, regarding documentation that would be required for invoice GRHI-CA-010 to be approved. Respondent’s Addendum ¶ 20; Exhibits 52 at 1781-84, 55 at 1864; *see* Appellant’s Answer to Addendum ¶ 20.

During its communications with Mr. Elmahmoud in 2019 and 2020, MLU did not send any of the three invoices for which MLU is seeking payment in this appeal to the FEMA Finance Center email address identified in the task orders or to the contracting officer.

IV. The Conclusion of FEMA’s Audit, and MLU’s Response

By July 7, 2021, FEMA’s “audit” of MLU’s invoices was complete. *See* Complaint ¶¶ 19-20; Answer ¶¶ 19-20; Exhibit 73 at 2466. FEMA provided MLU a detailed list of issues concerning prior invoices on July 7, 2021. Exhibit 92 at 2682-2772. Notably,

FEMA's email providing the audit findings only addressed "invoices submitted." *Id.* at 2701, 2772. Although FEMA, in its email, addressed other invoices that MLU had submitted under task orders 18, 43, and 55, it did not address or even mention the three invoices at issue here: 4407-CA-010, 4407-CA-012, and GRHI-CA-010. *See id.* at 2685-2700, 2750-2772.

On August 20, 2021, MLU's president emailed the FEMA contracting officer, responding to "the concerns raised by FEMA in the documents forwarded in your 7 July 2021 email." Exhibit 75 at 2477. She asserted that "MLU has prepared detailed responses to the issues raised for each of the three task orders, nos. 18, 43 and 55," including "narratives addressing each concern FEMA raised and, where appropriate, documentation supporting the narrative," which were available through electronic hyperlinks included in the email. *Id.* at 2477; *see id.* at 2480-82. She represented that "MLU Services has worked hard to address these issues" and that "[o]ur investigation has been thorough and included a detailed review of task order documentation, emails, changes, invoicing and accounting." *Id.* at 2480. She indicated her "hope that once your staff reviews the information we are providing in our response that the parties can proceed to final closeout and MLU receive amounts still unpaid." *Id.* at 2481. Nevertheless, MLU did not take any action at that time to submit invoices 4407-CA-010, 4407-CA-012, or GRHI-CA-010 to the FEMA Finance Center for payment despite being notified that the audit had concluded.

The record does not reflect any further communications between the parties between the remainder of 2021 and early 2023 regarding invoicing.

V. MLU's 2023 Certified Claim, and the Contracting Officer's Decision

On April 19, 2023, MLU submitted a certified claim to FEMA "requesting a contracting officer's final decision . . . for unpaid amounts on [five invoices under task orders 18, 43, and 55] under the [LOGHOUSE] Contract." Exhibit 79 at 2497. MLU asserted in the claim that it had "properly billed for the outstanding \$2,915,920.31 via five separate pay requests from August 29, 2019, through December 5, 2019." *Id.* While MLU is no longer seeking payment in this appeal on two of the five invoices in its 2023 certified claim, all five invoices form the \$2,915,920.31 portion of the government claim here:

- \$703,230 for invoice 4407-CA-010, dated September 26, 2019, under task order 18
- \$709,976.16 for invoice 4407-CA-012, dated December 2, 2019, under task order 18
- \$1,341,366 for invoice GRID-CA-008, dated August 29, 2019, under task order 43 (withdrawn from MLU's appeal but still part of the government claim)

- \$79,510.17 for invoice GRHI-CA-009, dated December 5, 2019, under task order 55 (withdrawn from MLU’s appeal but still part of the government claim)
- \$81,837.98 for invoice GRHI-CA-010, dated December 6, 2019, under task order 55

Id. at 2499. MLU alleged that “FEMA refused payment, claiming that an ongoing audit into Task Orders [18], 43, and 55 justified the withholding.” *Id.* at 2497. MLU called the withholding of the \$2,915,920.31 payment “wrongful.” *Id.* It also alleged that, based upon the non-payment of its invoices, it was entitled to \$54,750.62 in interest under the Prompt Pay Act (PPA), 31 U.S.C. § 3903, and FEMA Directive 126-6, “calculated using the application [sic] Contract Disputes Act interest rate and . . . limited to one year of interest from the date submitted.” Exhibit 79 at 2499.

The FEMA contracting officer initially notified MLU that he would respond to the certified claim by August 18, 2023, Exhibit 80 at 2508, but later revised that date to October 31, 2023. Exhibit 81 at 2511-12. In the letter accompanying its second extension, the contracting officer indicated that his “initial review has indicated that there are a number of discrepancies between the Claim and FEMA’s internal records.” *Id.* at 2511. With regard to invoice GRID-CA-008 under task order 43, for which MLU was seeking payment of \$1.341 million, the contracting officer stated that, according to FEMA records, MLU’s initial submission contained two dollar entries, one for \$1,010,200 million and one for \$329,670, but that, when MLU submitted the invoice to the FEMA Finance Center for payment, the invoice only included the \$1,010,200 request, which FEMA paid in January 2020. *Id.*; see Exhibit 50 at 1774-78. With regard to the invoices under task orders 18 and 55, the contracting officer represented that FEMA’s “records indicate that they were submitted for courtesy review, but then withdrawn,” and that FEMA had “still not found any record of their formal re-submission before they were submitted with the Claim.” *Id.* The contracting officer contemplated discussions with MLU to address “potential paths forward.” *Id.* at 2512.

On October 25, 2023, before the contracting officer had issued a decision on MLU’s claim, Mr. Fradella emailed four of the five invoices discussed in its claim (each accompanied by an SF 1034) to the FEMA Finance Center, using the address required by the contract, “for payment.” Exhibits 84, 85, 87, 88. With regard to the fifth invoice (GRID-CA-008), MLU renumbered it to read “GRID-CA-008-A,” revised it to request payment of only \$329,670 (presumably to account for the \$1,010,200 that FEMA had previously paid on invoice GRID-CA-008 in January 2020), and emailed it on October 25, 2023, to the FEMA Finance Center “for payment.” Exhibit 86. These communications reflect the first

time that MLU submitted the invoices for which MLU is seeking payment in this appeal to the FEMA Finance Center for payment. ⁶

On October 30, 2023, the FEMA contracting officer issued a final decision denying MLU's certified claim. Exhibit 89 at 2659. The contracting officer indicated that each of the five invoices for which MLU was now seeking payment had been submitted to Mr. Elmahmoud for only a "courtesy review" and that FEMA could not have refused payment for invoices that it did not formally receive. *Id.* at 2655-56. The contracting officer also acknowledged that MLU had submitted invoices five days prior and asserted that FEMA was forced to deny those invoices because MLU had submitted them immediately before FEMA's deadline for a final decision on MLU's certified claim, foreclosing any opportunity for corrections or additional substantiating documentation. *Id.* at 2656.

After denying MLU's certified claim, the FEMA contracting officer then added a government claim into the final decision, as follows:

After careful review, I have determined that MLU is currently indebted to the Government in the amount of \$2,978,670.93. This amount covers the amount of the unsupported part of the claim (\$2,915,920.31), the unsupportable amount of interest in the claim (\$54,750.62), and the Government's costs attributable to reviewing the unsupported part of the claim under the Contract Disputes Act (at least \$8,000.00).

Exhibit 89 at 2656-57. As the basis for this government claim, the contracting officer asserted that, "[u]nder 41 U.S.C. § 7103(b), claims against the government for more than \$100,000.00 must be certified" and that "[t]he purpose of this certification requirement is to trigger a contractor's potential liability for a fraudulent claim under the CDA." *Id.* at 2657. He represented that the CDA's anti-fraud provision, 41 U.S.C. § 7103(c)(2), entitled him to assess damages "[i]f a contractor is unable to support any part of the contractor's claim and it is determined that the inability is attributable to a misrepresentation of fact or fraud by the contractor." *Id.* (quoting section 7103(c)(2)). He claimed that, even though FEMA had identified numerous issues with MLU's draft invoices during discussions with MLU, MLU

⁶ On November 27, 2023, Mr. Fradella submitted "MLU Invoice 4407-CA-010-R1" to the FEMA Finance Center, using the address identified in the contract, "for payment," Exhibit 96, and, on January 22, 2024, he submitted "MLU Invoice GRHI-CA-009-R2 for payment." Exhibit 98. The reasons for these submissions are not explained in the record, but the dollar amounts being sought did not change from what was requested when invoices 4407-CA-010 and GRHI-CA-009 were essentially submitted on October 25, 2023. *See* Exhibits 96, 98.

submitted a claim that it “falsely certified . . . ‘accurately reflects’ the amount owed to it ‘to the best of [its] knowledge and belief.’” *Id.* at 2657-58. After recounting how MLU had not supported its claim with documentation, he represented that “it is well established that a baseless certified claim is a fraudulent claim.” *Id.* at 2658. Adding to the alleged fraud, he discussed MLU’s inclusion in its certified claim of a demand for payment of more than \$1.3 million under invoice GRID-CA-008, even though FEMA had previously paid approximately \$1,010,200 under the invoice that MLU had originally submitted to the FEMA Finance Center. *Id.* at 2651, 2658. Accordingly, he found “that MLU is currently indebted to the Government in the amount of \$2,978,670.93.” *Id.* at 2659.

VI. Proceedings Before the Board

MLU filed a notice of appeal of the contracting officer’s decision with the Board on January 25, 2024. Because the appeal involved both an affirmative monetary claim by MLU and a government claim, the Board directed MLU to file a complaint addressing the allegations supporting its monetary claim, FEMA to file a responsive answer and an addendum addressing the allegations supporting FEMA’s monetary claim, and MLU to file an answer to FEMA’s addendum.

In its complaint, filed February 26, 2024, MLU represented that it was removing its request for payment of invoices GRID-CA-008 and GRHI-CA-009 from the appeal, Complaint ¶ 7, and that its appeal was now limited to FEMA’s non-payment of three of the five invoices originally at issue in its certified claim—\$703,230 for 4407-CA-010, \$709,976.16 for 4407-CA-012, and \$81,837.98 for GRHI-CA-010—plus PPA interest. *Id.* ¶¶ 18, 23, 25-27, 29-31. MLU also alleged that FEMA’s use of its audit as an excuse to withhold payment constituted a breach of the implied duty of good faith and fair dealing. *Id.* ¶¶ 33-40.

Pursuant to the Board’s direction, FEMA filed an addendum (in the form of a complaint by the Government) along with its answer, identifying the allegations supporting FEMA’s claim against MLU. In count I of that addendum, FEMA alleged that MLU’s actions in submitting the invoices identified in its monetary claim constituted fraud, as outlined in the contracting officer’s decision dated October 25, 2023, and that FEMA was entitled to recovery under section 7103(c)(2). In addition, FEMA added five additional counts. In count II of its addendum, FEMA sought payment of \$386,890.23 in offsets that MLU allegedly acknowledged in its April 19, 2023, certified claim that it owed because of improper billing practices and other billing issues uncovered by FEMA’s audit. Respondent’s Addendum ¶¶ 33-36. In counts III, IV, V, and VI, FEMA requested reimbursement of \$13,578 for costs that it “incurred . . . in reviewing [MLU’s] claims and investigating matters,” *id.* ¶¶ 42, 49, 56, 66, on one of four alternative theories: (1) that MLU’s decision to commence litigation rather than follow the invoice submission terms of

its contract was a breach of contract (*id.* ¶¶ 38-42); (2) that MLU’s failure to make detailed payroll records available for inspection, copying, or transcription under FAR 52.222-8(c), despite repeated requests from FEMA, was a breach of contract (*id.* ¶¶ 44-49); (3) that MLU’s failure to produce adequate supporting data that FEMA repeatedly requested under FAR 52.232-5(b)(1)(v) was a breach of contract (*id.* ¶¶ 51-56); and (4) that MLU’s lack of good faith in producing documents under FAR 52.222-8 and 52.232-5 was a breach of contract (*id.* ¶¶ 58-66), as was its refusal “to allow FEMA more than four days to review the invoices once it finally submitted them properly” on October 25, 2023, and “when it made intentional misrepresentations both to FEMA in its certified claim and to this Board in its Complaint.” *Id.* ¶¶ 60-61, 63, 64.

On May 1, 2024, FEMA filed a motion seeking summary judgment on MLU’s affirmative monetary claim, arguing that, because MLU did not meet the clear contractual requirement to submit its invoices to the FEMA Finance Center, FEMA’s obligation to pay the invoices never arose, and FEMA did not breach any contract provisions through non-payment. Respondent’s Motion for Summary Judgment at 2-3. In response, MLU raised various arguments to excuse the absence of invoice submissions to the FEMA Finance Center and, further, argued that, at the very least, its invoices were clearly before the contracting officer when he issued his October 30, 2023, decision because MLU had properly submitted them on October 25, 2023, while its claim was still pending before the contracting officer.

MLU filed its own motion, asking the Board to “strike” (and dismiss for lack of jurisdiction) count I of FEMA’s addendum, which involves FEMA’s section 7103(c)(2) fraud claim against MLU, both because the contracting officer lacked authority to issue a decision seeking recovery under section 7013(c)(2) and because the Board lacks jurisdiction to entertain a fraud claim.

Discussion

I. FEMA’s Motion for Summary Judgment on MLU’s Monetary Claim

A. Standard of Review

Summary judgment is appropriate when there are no genuine disputes of material fact and the movant demonstrates that it is entitled to judgment as a matter of law. *Carmazzi Global Solutions, Inc. v. Social Security Administration*, CBCA 6264, et al., 19-1 BCA ¶ 37,439, at 181,950. Genuine disputes of material fact exist when a rational finder of fact could resolve an issue in favor of either party and the resolution of that issue would impact the outcome of the case under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

247-48 (1986). We must view all inferences in a light most favorable to the nonmoving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Nevertheless, “[w]ith respect to whether there is a genuine issue, [a tribunal] may not simply accept a party’s statement that a fact is challenged.” *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 835-36 (Fed. Cir. 1984). To the contrary, “[t]he party opposing the motion must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant. Mere denials or conclusory statements are insufficient.” *Id.* at 836. “Argument and assertion of counsel cannot substitute for factual statements under oath that establish a genuine material issue of fact.” *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 1404 (Fed. Cir. 1984).

B. MLU’s Non-Compliance with Contract Invoicing Requirements

“Contract language must be read in accordance with its express terms” and “given the plain meaning that a reasonably intelligent person, acquainted with the circumstances, would derive from that language.” *Wu & Associates, Inc. v. General Services Administration*, CBCA 6760, 21-1 BCA ¶ 37,965, at 184,383. “The contract must be read as a whole and in light of its purpose. Reasonable meaning must be given all parts of the [contract] so as not to render any portion meaningless, or to interpret any provision so as to create a conflict with other provisions of the contract.” *Columbia Construction Co. v. General Services Administration*, CBCA 3258, 15-1 BCA ¶ 35,856, at 175,319.

Here, the plain language of each task order regarding invoice submission is clear: “Contractors must submit vouchers electronically in pdf format to the FEMA Finance Center at [FEMA Finance Center Vendor Payment Address]@fema.dhs.gov” and must also provide a copy electronically to the contracting officer. Exhibits 7 at 1346, 15 at 1474, 26 at 1577. Elsewhere, each task order similarly provides that “[i]nvoices shall be submitted to the following: FEMA FINANCE: [FEMA Finance Center Vendor Payment Address]@fema.dhs.gov.” Exhibits 7 at 1343, 15 at 1472, 26 at 1565. When MLU submitted its April 19, 2023, certified claim to the contracting officer seeking damages for non-payment of the invoices at issue in the claim, MLU had not yet submitted the invoices to the FEMA Finance Center as required by its contract.

“Under the contract’s payment clause, ‘[t]here [is] no breach until appellant request[s] payment and the government reject[s] the request.’” *OST, Inc. v. Department of Homeland Security*, CBCA 7077, et al., 23-1 BCA ¶ 38,414, at 186,666 (quoting *Parsons-UXB Joint Venture*, ASBCA 56481, 09-2 BCA ¶ 34,305, at 169,459); see *Todd Pacific Shipyards Corp.*, ASBCA 55126, et al., 11-1 BCA ¶ 34,759, at 171,087 (“[T]here can be no breach of that [payment] clause . . . until the contractor requests payment and the government fails to

pay.”). Compliance with contractually-required invoicing procedures is a prerequisite to the agency’s obligation to pay. *L&A Jackson Enterprises v. United States*, 38 Fed. 22, 45 (1997), *aff’d*, 135 F.3d 776 (Fed. Cir. 1998) (table). Because MLU had not submitted its invoices in the manner that its contract required before it submitted its certified claim, it had no basis for asserting that FEMA had breached its contract by not paying invoices that it had failed properly to submit.

C. MLU’s Excuses for Non-Compliance

MLU does not dispute that it did not follow the contract’s invoice submission process before it submitted its certified claim. It argues, however, that it was excused from doing so. As we discuss below, the problem with the reasons that MLU identifies to excuse itself from complying with contract requirements is that they are largely based upon factual allegations wholly unsupported in the record. A party opposing summary judgment cannot simply cite to its own complaint to create a genuine material factual dispute but needs to identify actual evidence in the record, whether documentary or testimonial, that shows a genuine dispute. *Barmag Barmer Maschinenfabrik*, 731 F.2d at 836. Many of the alleged factual disputes that MLU identifies in its briefing are wholly unsupported (and often contradicted) by the evidence in the record, which is fatal to MLU’s alleged defenses.

MLU first asserts that it “submitted these invoices to the Contracting Officer directly via email on December 10, 2019, February 24, 2020, and December 16, 2019,” which, it claims, should be viewed as a formal submission for payment under the contract. Appellant’s Opposition to Motion for Summary Judgment (Response Brief) at 1 (citing Exhibits 46, 49, 56). As an initial matter, the appeal file exhibits to which MLU cites show that the invoices in question were emailed *not* to the contracting officer but instead to Mr. Elmahmoud, as primary or alternate COR, for the task orders. MLU cites no evidence (either documentary or testimonial) that it ever submitted invoices directly to the contracting officer. Even if it had, the contract’s invoicing provisions required MLU formally to submit invoices for payment to *both* the FEMA Finance Center *and* the contracting officer. Under the plain terms of the contract, submission of an invoice solely to the contracting officer was not a formal submission for payment. Although MLU asserts that its failure to submit the invoices to the payment center was simply “a clerical discrepancy which caused no prejudice to the Government,” *id.* at 3, it is FEMA’s receipt of a properly submitted invoice that initiates FEMA’s obligation to pay within a thirty-day period and to pay PPA interest if late. 5 CFR 1315.4(b), (f); *see* FAR 52.212-4(i)(2). Payment is not due until “30 days after the start of the payment period,” which commences on “the date of [the agency’s] receipt of a proper invoice.” 5 CFR 1315.4(f), (g)(1)(iv); *see Safeguard Maintenance Corp.*, GSBCA 6054, 83-1 BCA ¶ 16,276, at 80,874 (“The [PPA] provides for payment of interest for delayed payments of properly submitted invoices.”). MLU cannot validly assert that FEMA was in

breach of the contract's payment provision when, under that provision, its duty to pay had not yet accrued.

MLU then argues that, despite the contract language, the parties established a "course of performance" whereby FEMA would accept and pay invoices submitted only to the contracting officer (or, in reality, to the COR), without a need also to submit them to the FEMA Finance Center. Appellant's Response Brief at 2; *see id.* at 3 (identifying "whether the parties had established a course of performance regarding invoice submission" as a factual issue precluding summary judgment). We recognize that a course of performance may, in appropriate circumstances, be "relevant to show a waiver or modification of any term [in the contract] inconsistent with the course of performance." *Universal Development Corp. v. General Services Administration*, GSBCA 11468, 93-2 BCA ¶ 25,662, at 127,676 (1992) (quoting Uniform Commercial Code § 2A-207(3) (1992)), *motion for reconsideration denied*, 93-2 BCA ¶ 25,845. In fact, under the task orders at issue here, "the Contractor, the Contracting Officer, and the payment office" could "mutually agree[]" to allow the contractor, if it was "unable to submit a payment request in electronic form," to submit using another method. Exhibits 7 at 1346, 26 at 1577.⁷ Yet, MLU offers no evidence to substantiate its factual assertion that there was a course of performance that conflicted with the contract requirements or some type of mutual agreement to change the submission method. To the extent that MLU argues that other invoices were paid after being submitted only to the COR, it cites no evidence (either documentary or testimonial) that FEMA ever paid an invoice submitted only to Mr. Elmahmoud. To the contrary, the only payment evidence in the record shows an invoice that was paid only after MLU emailed it to the FEMA Finance Center. Exhibits 50, 51 at 1779. Further, the declaration from Mr. Fradella, upon which MLU mainly relies to support its summary judgment response, indicates his understanding that, once Mr. Elmahmoud approved an invoice, Mr. Fradella was then supposed to submit it to the FEMA Finance Center to obtain payment:

5. During performance of the billing and invoicing, FEMA and MLU established a practice of informal invoice submission to Mohamad Elmahmoud, the Quality Assurance Specialist with FEMA.
6. After approval by Mohamad Elmahmoud, I would submit the approved invoice to FEMA finance.

⁷ Given that MLU eventually (in October 2023) submitted the invoices at issue electronically to the FEMA Finance Center, after it had already submitted its certified claim, it cannot reasonably argue that it was "unable to submit" its invoices electronically.

Fradella Declaration ¶¶ 5-6. MLU cannot rely on a “course of performance” or waiver defense without citing to *any* evidence that such a course of performance actually existed.

MLU then argues that, because “the Government made clear its intent to prevent and hinder payment by telling MLU [in July 2019] that no further invoices would be processed until the audit was completed,” MLU should be entitled to payment even without submitting any invoices. Appellant’s Response Brief at 6. It asserts that, “[w]hen a party asserting a condition precedent as a defense hindered or prevented fulfillment of that condition precedent, . . . the hindering party cannot rely on the failure to avoid its own obligations to act under the contract.” *Id.* at 5 (citing *Haddon Housing Associates, Ltd. Partnership v. United States*, 711 F.3d 1330, 1338 (Fed. Cir. 2013)). The problem for MLU is that there is no evidence, documentary or testimonial, that Mr. Elmahmoud ever told Mr. Fradella that MLU was barred from submitting its invoices to the FEMA Finance Center or that the Government took any other action to preclude submission. Mr. Elmahmoud merely said (according to the evidence upon which MLU relies) that FEMA was going to pause processing of invoicing pending the audit, without anything more, as MLU’s declarant acknowledged:

7. During performance of the project at Gridley, I had a phone conversation [with] Mohamad Elmahmoud in July 2019 on invoicing. During this conversation, I was informed that FEMA was starting an audit of MLU and that future invoices would not be processed until the audit was complete.
8. Based on that conversation, we paused formal submission of pending invoices to FEMA finance as we understand from Mohamad Elmahmoud that they would not be processed.

Fradella Declaration ¶¶ 7-8.⁸ While Mr. Elmahmoud’s words “may have served to discourage” MLU from submitting its invoices, they “nevertheless did not impede [MLU] from doing so.” *Haddon Housing*, 711 F.3d at 1338. The only way for MLU to have created an obligation for FEMA to pay its invoices was to submit them, which would have provided MLU with a basis for alleging a breach through FEMA’s non-payment. *See OST, Inc.*, 23-1 BCA at 186,666. “Absent a showing that [FEMA] took some action that prevented or hindered [MLU’s] ability to submit its [invoices], the prevention doctrine does not apply to

⁸ We recognize that, in his declaration, Mr. Elmahmoud disputes making the representations that Mr. Fradella attributes to him, Elmahmoud Declaration ¶¶ 6-7, but we will assume for purposes of resolving MLU’s defense to FEMA’s summary judgment motion that MLU’s allegations are true.

excuse [MLU's] failure to submit" its invoices for payment to the FEMA Finance Center. *Haddon Housing*, 711 F.3d at 1339. MLU has cited no evidence that FEMA barred, rather than potentially discouraged, MLU from submitting invoices to FEMA Finance and thereby setting up its claim for a right to payment.⁹

MLU's defense of futility similarly must fail. MLU argues that it was "not required to engage in futile acts, including the formal submission of invoices that the Government had already told MLU would not be processed." Appellant's Response Brief at 6. The board in *Donohoe Construction Co.*, ASBCA 47310, et al., 98-2 BCA ¶ 30,076, *aff'd on reconsideration*, 99-1 BCA ¶ 30,387, considered a situation similar to that here, where the Government's project manager had informed the contractor that he would not authorize progress payments until certain pending issues were resolved. The contractor sought to justify its subsequent delay in submitting pay applications on the basis of futility, arguing that, even though the project manager had never refused to accept pay applications, there had been no point in submitting them before the project manager was ready and willing to process them and authorize payment. The board disagreed, finding that submission would not have been futile because, in addition to creating the prerequisite for a breach claim, submission would "start[] the clock on PPA interest." *Id.* at 148,834. Had MLU submitted its invoices and payment was not forthcoming, MLU potentially would have a basis for PPA interest running thirty days from the date of submission. *See* 31 U.S.C. § 3903(a)(1)(B). MLU cannot rely on a futility argument.

Further, even if FEMA's announcement of an audit could be viewed as somehow precluding MLU from submitting invoices to the FEMA Finance Center or rendering such an act futile, MLU acknowledges that the audit concluded in July 2021—nearly two years before MLU submitted its certified claim. Complaint ¶¶ 19-20; *see* Answer ¶¶ 19-20; Exhibits 73, 92. MLU says that Mr. Elmahmoud originally told Mr. Fradella, in July 2019, that invoices would not be processed until the audit concluded. Fradella Declaration ¶ 7. MLU provides no explanation of why, once the audit concluded, it did not submit and could not have submitted the invoices at issue for payment before it submitted its certified claim. Again, until it actually submits the invoices, it has no basis for alleging a breach by non-payment. *OST, Inc.*, 23-1 BCA at 186,666.

⁹ MLU argues in its summary judgment response that "a fact issue remains as to whether the Government informed MLU to not submit the invoices because they would not be processed until the audit was complete." Appellant's Response Brief at 7. To the extent that MLU is saying that FEMA barred it from submitting invoices, or even told it to stop submitting invoices, it has cited absolutely no evidence in support. MLU cannot preclude summary judgment by alleging facts in its brief that lack any documentary or testimonial support.

Finally, MLU argues that it is not precluded from claiming a breach through non-payment because “the Government cannot hide behind alleged defects in an invoice where it does not notify the contractor of such defects.” Appellant’s Response Brief at 5. MLU cites no support for its position that FEMA is obligated, as some type of good faith duty, to tell MLU to submit invoices. To the extent that MLU has cited authority suggesting that the agency must notify a contractor of problems with an invoice (*see* Appellant’s Response Brief at 5 n.16 (citing *EMS, Inc.*, GSBCA 9588, et al., 90-2 BCA ¶ 22,876)), that authority relies on the PPA, which requires that “any invoice determined not to be such a proper invoice suitable for payment shall be returned as soon as practicable, but not later than 7 days, *after receipt*.” 31 U.S.C. § 3903(a)(7)(B) (emphasis added). Under the plain language of the regulation, that duty does not arise until MLU has submitted and FEMA has received an invoice. Here, MLU did not formally submit its invoices before submitting its certified claim, meaning that the PPA provision requiring FEMA action “after receipt” of a defective invoice does not apply.

D. MLU’s Post-Claim Submission of the Invoices

On October 25, 2023, six months after MLU had submitted its certified claim to the contracting officer, MLU submitted the disputed invoices to the FEMA Finance Center for payment. In his decision on the claim, issued just five days later, the contracting officer acknowledged that MLU had just submitted the invoices using the correct contractual procedure but rejected them because he did not have enough time to digest them before having to issue a decision.

MLU argues that, because it submitted the invoices at issue before the contracting officer issued his decision, that submission merged into its pending certified claim and provides a basis for payment through this appeal. We disagree.

The CDA mandates that “[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision.” 41 U.S.C. § 7103(a)(1). An action brought under the CDA “must be ‘based on the same claim previously presented to and denied by the contracting officer.’” *Qwest Communications Co. v. General Services Administration*, CBCA 3423, 14-1 BCA ¶ 35,655, at 174,564 (quoting *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003)). “It must arise from the same operative facts and claim essentially the same relief.” *Id.*; *see EHR Doctors, Inc. v. Social Security Administration*, CBCA 3522, 14-1 BCA ¶ 35,630, at 174,492. The claim that MLU submitted to the contracting officer on April 19, 2023, alleged that MLU had submitted invoices to FEMA between August and December 2019 (either physically or through a legal theory excusing formal submission) and that FEMA’s failure to pay those invoices was a breach of FEMA’s contract obligations, entitling MLU to payment of the invoiced amounts plus PPA interest. MLU wants to include the validity of its formal

submission of those invoices to the FEMA Finance Center in October and November 2023 as part of the “same operative facts” identified in the original claim. To consider the validity of MLU’s post-claim invoice submissions under the contract terms, we have to focus on a completely different time period and scope of activities than when considering MLU’s alleged August through December 2019 submissions. Because the facts and evidence necessary to evaluate the two different sets of submissions are separate and distinct, involving activities during different time periods, the “operative facts” underlying the separate submissions are not the same. *See Crane & Co. v. Department of the Treasury*, CBCA 4965, 16-1 BCA ¶ 36,539, at 178,005-06 (finding that legal theory dependent on actions occurring before contract award was not based on the “same operative facts” as legal theory dependent on actions occurring during contract performance). Accordingly, the events giving rise to the October 25, 2023, invoice submissions do not constitute the “same claim” that was presented to the contracting officer on April 19, 2023, and cannot, therefore, properly be viewed as incorporated into that claim. *See id.* at 178,006. To the extent that MLU is complaining about non-payment of invoices that it submitted on October 25, 2023, it must submit a claim to the contracting officer challenging that non-payment.

E. MLU’s Implied Duty Breach Argument

MLU asserts that its “payment requests were denied, at least in part, based on an alleged audit that FEMA was performing, which FEMA used as an excuse to withhold payments to MLU.” Complaint ¶ 35. It argues that FEMA’s failure to make payment during the audit or afterwards breached FEMA’s implied duty of good faith and fair dealing. *Id.* ¶¶ 33-40. Given that FEMA has established that MLU failed to submit its invoices in accordance with contract requirements before MLU submitted its certified claim and that payment was therefore never due, MLU has no basis for pursuing this implied duty breach claim. FEMA had no obligation under the contract prior to formal invoice submission.

F. MLU’s Request for PPA Interest

MLU asks for PPA interest on the delays in payment of its 2019 invoices. “Respondent’s obligation to pay interest on an invoice would arise only if payment was not made within 30 days after receipt of a proper invoice.” *Unarco Material Handling*, PSBCA 4100, 00-1 BCA ¶ 30,682, at 151,526 (1999); *see* 31 U.S.C. § 3103(a)(1)(B). Having found that MLU did not properly submit invoices for payment in 2019 or at any time before MLU submitted its certified claim, there is no basis for awarding PPA interest to MLU.

II. MLU's Motion Regarding FEMA's Fraud Claim (Addendum Count I)

A. Standard of Review

The Board's jurisdiction is derived from the CDA, 41 U.S.C. §§ 7101-7109. "[T]he strict limits of the CDA" constitute "jurisdictional prerequisites to any appeal." *England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004). If jurisdiction is found to be lacking, the Board must dismiss the matter. *Universal Canvas, Inc. v. Stone*, 975 F.2d 847, 850 (Fed. Cir. 1992).

B. Contracting Officer's Lack of Authority to Seek Fraud Damages

The FEMA contracting officer purported to issue a final decision asserting a government claim against MLU arising under section 7103(c)(2), the anti-fraud provision of the CDA, and seeking penalties for which section 7103(c)(2) provides. That statutory provision grants the Government the following relief if a contractor submits a fraudulent claim:

Liability of contractor.—If a contractor is unable to support any part of the contractor's claim and it is determined that the inability is attributable to a misrepresentation of fact or fraud by the contractor, then the contractor is liable to the Federal Government for an amount equal to the unsupported part of the claim plus all of the Federal Government's costs attributable to reviewing the unsupported part of the claim. Liability under this paragraph shall be determined within 6 years of the commission of the misrepresentation of fact or fraud.

41 U.S.C. § 7103(c)(2). To recover under this provision, "the government is required to establish that the contractor made false or fraudulent statements in its submitted claim with an intent to deceive or mislead the government." *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1362 (Fed. Cir. 1998); see 41 U.S.C. § 7101(9) ("The term 'misrepresentation of fact' means a false statement of substantive fact, or conduct that leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.").

The contracting officer's decision asserting a government claim under section 7103(c)(2) is void and unenforceable. The Court of Appeals for the Federal Circuit has held that "Congress did not intend fraud claims by the government to be included in the dispute process outlined by section [7103(a) of the CDA] and that Congress never intended to include claims brought under section [7103(c)(2)] to be within the agency dispute resolution process." *Martin J. Simko Construction, Inc. v. United States*, 852 F.2d 540, 545 (Fed. Cir.

1988). It specifically held that contracting officers lack authority to issue decisions asserting government claims under the CDA's anti-fraud provision:

[A]s the legislative history [of the CDA] clearly shows, the changes made to sections [7103(a) and 7103(c)(2)] were designed, among other things, to clarify *the exclusion of fraud claims from agency jurisdiction*, while preserving some aspects of the all disputes language.

. . . . Senate Report 1118 specifically states that the Department of Justice would be "solely" responsible for "actions to enforce the Government's rights under section [7103(c)(2)]." S. Rep. 1118, at 20, U.S. Code Cong. & Admin. News 1978, p. 5254. . . . *Section [7103(c)(2)], which was added by the Committee, was, therefore, never intended to be within the purview of the [contracting officer]. In addition to the clearly expressed legislative intent to exclude fraud claims generally from the "all disputes" provision, Congress felt it necessary to emphasize that the Department of Justice would be the only federal agency with responsibility and power to enforce section [7103(c)(2)].*

Id. (emphasis added).

Similarly, in *Warren Beaves*, DOT CAB 1160, et al., 84-1 BCA ¶ 17,190, one of our predecessor boards recognized that "in the legislative history of the Contract Disputes Act, Congress has made abundantly clear that Contracting Officers . . . do not have jurisdiction in fraud matters." *Id.* at 85,595. It found that the legislative history of the CDA "could not more clearly express the intent of Congress that all actions to enforce the rights given by [section 7103(c)(2)] of the Act are to be the responsibility of the Justice Department, a term which does not include the Contracting Officer, and are to be *instituted by the United States in a court of competent jurisdiction.*" *Id.* It held that a contracting officer's decision that purports to assess fraud damages against a contractor under section 7103(c)(2) is not actually a final decision and is not enforceable against the contractor:

The Contract Disputes Act, viewed in its entirety, is an effort to set up a unified three-tier procedure for the litigation of contract disputes: final decision, Contract Appeals Board or Claims Court, and Court of Appeals for the Federal Circuit. By the above-quoted language, it appears to us that Congress has manifested an intent to completely remove fraud litigation from the three-tiered procedure established by the Act, and place it in the general tribunal, the District Court, where a contractor would have all of the rights available in that Article III court. . . . The conclusion must necessarily follow that a "final decision" assessing a Section [7103(c)(2)] claim is not a final decision as that term of art is used in the Contract Disputes Act, namely a

written determination by a Contracting Officer from which an appeal must be taken to a board of contract appeals, and therefore is not to be accorded the finality of such a true final decision, nor will it be subject to the normal three-tier appeals procedure.

Id. Accordingly, it held, “Contracting Officer decisions under Section [7103(c)(2)] are not final decisions as that term is used in the [CDA].” *Id.*

Pursuant to the CDA, the Board possesses jurisdiction to consider a dispute over a government claim only if a contracting officer issues a valid final decision asserting the government claim and the contractor timely appeals it. *National Fruit Product Co. v. Department of Agriculture*, CBCA 2445, 12-1 BCA ¶ 34,979, at 171,932; *see* 41 U.S.C. § 7103(a)(3)-(4) (Under the CDA, “[e]ach claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer” and “submitted within 6 years after the accrual of the claim.”). Because the contracting officer’s decision purporting to assert a fraud claim against MLU under section 7103(c)(2) is void and unenforceable, there is no valid contracting officer’s decision upon which to invoke the Board’s jurisdiction over the government claim addressed in count I of FEMA’s addendum. Accordingly, count I of the addendum, as well as the portion of MLU’s appeal challenging the contracting officer’s decision seeking recovery under section 7103(c)(2), are dismissed for lack of jurisdiction.¹⁰

III. FEMA’s Non-Fraud Claims (Addendum Counts II through VI)

In the addendum to its answer, which essentially served as the complaint for FEMA’s monetary claim, FEMA included five non-fraud counts (counts II through VI). Notably, these counts seek costs that are not included in the October 25, 2023, final decision on appeal. As previously discussed, the Board possesses jurisdiction under the CDA to consider a dispute over a government claim only if a contracting officer has issued a valid final decision asserting the government claim and the contractor has timely appealed. *National Fruit Product*, 12-1 BCA at 171,932. Although MLU did not address these counts in its motion to strike or ask to dismiss them, we plainly lack jurisdiction to entertain them. Because dismissal of counts II through VI allows for full resolution of the issues in this appeal, we dispose of them here in light of this obvious jurisdictional defect.

¹⁰ Because we are dismissing the government claim for lack of a valid contracting officer’s final decision asserting it, we need not discuss the jurisdictional limitations on the Board’s consideration of fraud claims. *See TDC Management Corp.*, DOT BCA 1802, 90-1 BCA ¶ 22,627, at 113,492 (1989) (discussing jurisdictional issues surrounding fraud allegations).

Decision

With regard to MLU's April 19, 2023, monetary claim against FEMA, because MLU did not submit invoices for payment before submitting its claim for invoice non-payment, FEMA's motion for summary judgment is granted. Accordingly, MLU's appeal of the contracting officer's decision on its affirmative monetary claim is **DENIED**. This denial of MLU's claim does not preclude MLU from submitting and pursuing a new claim against FEMA for non-payment of invoices that it formally submitted on October 25, 2023.

With regard to FEMA's October 30, 2023, monetary claim asserting fraud penalties against MLU, the contracting officer's decision asserting that claim is void and unenforceable. Because no valid contracting officer's decision underlies any of the counts in FEMA's addendum, all of the government claims raised in this appeal are **DISMISSED FOR LACK OF JURISDICTION**.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.

Board Judge

We concur:

Beverly M. Russell

BEVERLY M. RUSSELL

Board Judge

Marian E. Sullivan

MARIAN E. SULLIVAN

Board Judge