



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION:
May 12, 2017

CBCA 5287

SAVANNAH RIVER NUCLEAR SOLUTIONS, LLC,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Karen L. Manos and Erin N. Rankin of Gibson, Dunn & Crutcher, LLP, Washington, DC, counsel for Appellant.

Lucy M. Knowles, Mary-Ellen Noone, Ralf Wilms and Jennifer B. Farmer, Office of Chief Counsel, Department of Energy, Aiken, SC; and Sky W. Smith, Office of Chief Counsel, Department of Energy, Cincinnati, OH, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **GOODMAN**, and **ZISCHKAU**.

GOODMAN, Board Judge.

Appellant, Savannah River Nuclear Solutions, LLC, has filed this appeal from what it characterizes as a contracting officer's deemed denial of its certified claim for certain costs with regard to the performance of its contract with respondent, Department of Energy. Respondent has filed a motion to dismiss this appeal for lack of jurisdiction, or alternatively to suspend proceedings. We grant the motion to dismiss, as we find that this Board lacks jurisdiction.

Factual Background

The claim that is the subject of this appeal arises under Contract No. DE-AC09-08SR22470 (contract), the management and operations contract for the Savannah River Site that appellant¹ has held with respondent since 2008. The claim concerns certain costs that appellant alleges are allowable pursuant to the contract. For three years, respondent paid these costs to appellant. In 2011 respondent's contracting officer informed appellant that he believed the costs may be unallowable under the terms of the contract. The parties attempted to negotiate a resolution. In 2013, respondent's contracting officer disallowed costs in the amount of \$1,256,481.²

On January 20, 2016, appellant was informed by the Department of Justice (DOJ) that a suit would be filed against appellant pursuant to the False Claims Act, 31 U.S.C. §§ 3729-3733 (2012) (FCA).

On February 10, 2016, appellant filed a certified claim pursuant to the Contract Disputes Act (CDA), 41 USC § 7101 *et seq.* (2012), requesting a contracting officer's decision interpreting the contract as to the allowability of the disputed costs under a specific clause of the contract, including the \$1,256,481 disallowed by the contracting officer in 2013.

On March 14, 2016, DOJ filed a complaint against appellant and one of its parent companies in federal district court in South Carolina asserting claims under the civil FCA, as well as for breach of contract, unjust enrichment, and payment by mistake.

By letter dated March 31, 2016 to appellant, a successor contracting officer informed appellant as follows:

SUBJECT: Response to Savannah River Nuclear Solutions . . . Certified Claim and Request for Final Decision . . . dated February 10, 2016.

The purpose of this letter is to formally respond to your subject letter of February 10, 2016. The costs identified in your letter were referred to the cognizant Office of Inspector General (OIG) and the Department of Justice

¹ Appellant is a sole-purpose entity consisting of three member companies that was formed to compete for the award of, and to perform, the contract.

² This sum had already been paid to appellant before the contracting officer determined it was not allowable.

(DOJ) as required by FAR [Federal Acquisition Regulation] 33.209 because our office suspected the costs were fraudulent. As you are aware, the DOJ and OIG investigated these costs. DOJ has filed a lawsuit concerning the costs against your parent company under the False Claims Act . . . Pursuant to FAR 33.210(b) a Contracting Officer's authority does not extend to the settlement, compromise, payment or adjustment of any claim involving fraud. Therefore, I have no authority to take action on the above claim.

On April 14, 2016, appellant filed a notice of appeal at this Board, which stated that appellant "appeals the deemed denial of its certified claim." The appeal was docketed as CBCA 5287. On May 19, 2016, appellant filed its complaint in the appeal.

On June 1, 2016, respondent filed a motion to dismiss for lack of jurisdiction or alternatively to suspend proceedings. In that motion, respondent asserts that the Board lacks jurisdiction pursuant to the CDA because the two jurisdictional bases of the CDA do not exist in this instance—there is no contracting officer decision denying the claim from which appellant may appeal, nor can appellant appeal from a deemed denial of the claim. Alternatively, respondent requests that if the Board determines that it has jurisdiction, proceedings be suspended pending resolution of the FCA action in the federal district court.

Appellant filed a reply to the motion, asserting that the Board has jurisdiction and proceedings should not be suspended. The parties thereafter filed sur-reply briefs.

Discussion

Applicable Statute and Regulations

The CDA requires that within 60 days of receiving a contractor's certified claim of more than \$100,000: "[a] contracting officer shall, within 60 days of receipt . . . (A) issue a decision; or (B) notify the contractor of the time within which a decision will be issued." 41 U.S.C. § 7103(f)(2).

The CDA specifies the contractor's right of appeal from a decision by a contracting officer: "A contractor, within 90 days from the date of receipt of a contracting officer's decision . . . may appeal the decision to an agency board . . ." 41 U.S.C. § 7104(a).

This Board "has jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency (other than . . . [excluded agencies]) relative to a contract made by that agency." 41 U.S.C. § 7105(e)(1)(B). Also, 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 as otherwise provided in this chapter.” 41 U.S.C. § 7103(f)(5).

The CDA also states that “[t]his section does not authorize an agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.” 41 U.S.C. § 7103(c)(1).

The Federal Acquisition Regulation contains the following provisions:

Suspected fraudulent claims.

If 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.

48 CFR 33.209.

Contracting officer’s authority

Except as provided in this section, contracting officers are authorized, within any specific limitations of their warrants, to decide or resolve all claims arising under or relating to a contract subject to the Disputes statute The authority to decide or resolve claims does not extend to –

(b) The settlement, compromise, payment, or adjustment of any claim involving fraud.

48 CFR 33.210.

The Contracting Officer Acted According to Statute, Regulation, and Applicable Case Law

In the instant case, appellant was advised by DOJ before it submitted its certified claim to the contracting officer that an action would be filed pursuant to the FCA. After the appellant submitted its certified claim to the contracting officer on February 10, 2016, but before the expiration of the 60-day period specified in the CDA during which a contracting officer must issue a final decision or notify the contractor when a decision will be issued, DOJ filed suit against appellant pursuant to the FCA, and the contracting officer issued a letter dated March 31, 2016, informing appellant that he would not issue a final decision as to the certified claim. That letter stated that because “our office suspected the costs were fraudulent,” the matter was referred to the cognizant agency official pursuant to FAR 33.209,

and the contracting officer therefore lacked authority to take action on the claim, citing FAR 33.210(b).

In *Newtech Research Systems LLC v. United States*, 99 Fed. Cl. 193 (2011), the court interpreted the two provisions, FAR 33.209 and 33.210(b), relied upon by the contracting officer in the instant case as divesting the contracting officer of the authority to decide the claim. The court stated:

By its terms, section 33.209 requires a contracting officer to refer any matter involving fraud “on the part of a contractor” to the appropriate agency official responsible for investigating fraud. The use of “shall” denotes mandatory language. *Andersen Consulting v. United States*, 959 F.2d 929, 932 (Fed.Cir.1992). Thus, when a contracting officer suspects fraud on the part of a contractor, the contracting officer cannot decide or resolve the claim. *See* 48 C.F.R. § 33.210(b). Instead, the contracting officer must refer the matter to the appropriate agency official for investigation. *See id.* § 33.209; *accord id.* § 49.106 (requiring that a terminating contracting officer “discontinue negotiations and *report the facts under agency procedures*” when fraud or other criminal conduct related to the settlement of a terminated contract is suspected (emphasis added)).

99 Fed. Cl. at 206.

In *Medina Construction Ltd. v. United States*, 43 Fed. Cl. 537 (1999), the contracting officer’s lack of authority to decide claims when a suspicion of fraud exists was emphasized. In that case, the contracting officer issued a final decision on a termination settlement proposal (TSP) denying the claim on the basis that fraudulent invoices were submitted by the contractor. In holding the final decision invalid, the court stated:

[T]he clear statutory language of the CDA specifically removes issues of fraud from administrative consideration. 41 U.S.C. § 605(a).³ Pursuant to the FAR, the suspicion of fraud is considered to be of such a sensitive nature that C[ontracting]O[fficer]s are specifically admonished not “to decide or settle . . . claims arising under or relating to a contract subject to the [CDA] . . . involving fraud.” 48 C.F.R. § 33.210(b). Even “[i]f the [CO] suspects fraud . . . related to the settlement of a terminated contract, the [CO is directed to] . . . discontinue negotiations and report the facts under agency procedures.” 48 C.F.R. § 49.106; *see also* 48 C.F.R. § 33.209. . . .

³ Apparent reference to the CDA provision currently codified at 41 U.S.C. § 7105.

Even if the CO's final decision is read in the broadest possible light, the government has not established that the CO incorporated a reason, separate and distinct from the fraud allegations, for the denial of Medina's TSP which would form a basis for its validity and thereby support this Court's jurisdiction. *Cf. Daff [v. United States]*, 78 F.3d at [1566]1572 [Fed. Cir. 1996]. Pursuant to the FAR, in addition to being specifically precluded from deciding or settling claims involving fraud, "[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 CO shall refer the matter to the agency official responsible for investigating fraud." 48 C.F.R. § 33.209; 48 C.F.R. § 33.210. It is apparent from the CO's final decision letter that the predominant basis for the assertion that Medina failed to support the costs submitted in the TSP was the CO's as yet unsubstantiated suspicion that fraudulent invoices had been submitted for payment. Although specifically precluded from determining claims involving fraud through administrative channels, the CO proceeded to deny Medina's claim based upon unproved allegations of fraud. Thus, the CO's final decision was unauthorized and invalid. Without a valid final decision, this Court cannot assume jurisdiction over this contract claim.

43 Fed. Cl. at 555-56.

We agree with the reasoning and conclusion of the Court of Federal Claims. 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 the claim when fraud is suspected. In the instant case, the contracting officer "suspected the costs were fraudulent," did not issue a final decision because he determined he was not authorized to do so, and therefore referred the matter to the appropriate agency official for investigation.⁴ The contracting officer's determination of lack of authority to issue a final decision is clearly supported by *Newtech*

⁴ Appellant suggests that the contracting officer could have issued a final decision on the contractual issue as to the allowability of the costs claimed, despite the fraud allegations. *See, eg., Daff v. United States*, 78 F.3d. at 1575 (a final decision terminating a contract on the basis of fraudulent conduct and other grounds was valid, resulting in CDA jurisdiction, when the decision asserted a basis for termination that the contracting officer had the authority to assert—failure to perform according to the terms of the contract). We cannot resolve a case based upon a suggestion of factual circumstances that did not occur. In the instant case, the contracting officer determined that he lacked authority to issue a decision, based upon his understanding of statute and regulations.

and *Medina*.⁵ Thus, it is clear that the contracting officer complied with the regulations 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 the agency official responsible for investigating fraud.

There is No Deemed Denial of Appellant's Claim

Respondent asserts that because the contracting officer did not have authority to issue a final decision in the instant case because of suspected fraud, appellant's claim can also not be deemed denied pursuant to the CDA. We have found no board or court decisions treating this issue with regard to the contracting officer's lack of authority to issue a final decision because of suspected fraud. However, there is ample case law that holds that in other circumstances, when a contracting officer is divested from authority to issue a final decision on a CDA claim, there can be no deemed denial of the claim that would confer CDA jurisdiction.

In *Case, Incorporated v. United States*, 88 F. 3d 1004, 1009 (Fed. Cir. 1996), the court stated: “[W]hen a contracting officer lacks authority to issue a final decision on a claim, there can be no valid deemed denial of the claim so as to confer CDA jurisdiction under 41 U.S.C. § 605(c)(5).”⁶

In *Ervin and Associates v. United States*, 44 Fed. Cl. 646 (1999), the contractor filed suit in a Federal District Court with regard to certain claims and thereafter filed the same claims pursuant to the CDA with the contracting officer. The contracting officer issued final

⁵ Appellant cites *BAE Systems Tactical Vehicle Systems, L.P.*, ASBCA 59491 et. al., 16-1 BCA ¶ 36,450, in which the contractor submitted a claim to the contracting officer, a FCA suit was filed thereafter against the contractor in Federal District Court, and the contractor then filed an appeal at the Armed Services Board of Contract Appeals from a deemed denial of its claim. The Government filed a motion to stay or alternatively to suspend proceedings in the appeal, and the ASBCA denied the motion. The Government did not raise a jurisdictional issue and the ASBCA's denial of the motion does not mention why the contracting officer did not issue a decision in response to the claim. Appellant also cites *TRW Inc.*, ASBCA 51172 et al., 99-2 BCA ¶ 30,407. These appeals were filed from deemed denials of two claims, and were preceded by two FCA suits. However, in the ASBCA's decision denying the Government's motion to dismiss or alternatively stay the appeals, the issue of the contracting officer's authority to decide claims involving fraud is not mentioned. Thus, the issue before us now was not addressed in these two decisions.

⁶ In *Case*, the contracting officer's final decisions were found to be valid.

decisions on some of the claims and refused to issue final decisions on the remainder. The contractor then appealed the final decisions and alleged deemed denials of its claims to the Court of Federal Claims pursuant to the CDA. The court, applying federal statute and citing *Case* above, found that the final decisions that had been issued were invalid and there could be no valid deemed denials of the claim, as the contractor's filing suit in the Federal District Court divested the contracting officer from authority to rule on the claim:

Under 28 U.S.C. § 516 (1993), "the conduct of litigation in which the United States . . . is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General." In *Sharman [Co. Inc. v. United States]*, 2 F.3d 1564 (Fed.Cir. 1993), overruled in part on other grounds by *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed.Cir. 1995)] the Federal Circuit clarified the applicability of this statutory provision to CDA claims, ruling that "[o]nce a claim is in litigation, the Department of Justice gains exclusive authority to act in the pending litigation." *Sharman*, 2 F.3d at 1571. Litigation becomes pending upon the filing of a complaint with the court. *See id.* The exclusive authority given to the Department of Justice under this provision divests the contracting officer of any authority to rule on the claim. *See Case*, 88 F.3d at 1009 (citing *Sharman*, 2 F.3d at 1571).

44 Fed. Cl. at 654.

The court stated further that when a contracting officer is divested of authority to decide a claim, there also can be no deemed denial.

Although plaintiffs' complaint was filed in this court on August 16, 1996, no claim was filed with the contracting officer until well after that date. The complaint filed in court and the complaint submitted to the contracting officer recite identical operative facts. Likewise, both complaints seek monetary relief. Thus, plaintiffs' claims are mirror images. As the "contracting officer lack[ed] authority to issue a final decision on [the] claim[s], there can be no valid deemed denial of the claim so as to confer CDA jurisdiction under 41 U.S.C. § 605(c)(5)." *Case*, 88 F.3d at 1009.

44 Fed. Cl. at 656. *See also, Roxco Ltd. v. United States*, 77 Fed. Cl. 138, 149 (2007) (contracting officer did not have the authority to issue a decision on a claim, and therefore there could be no appeal of a deemed denial of that claim); *Diversified Maintenance Systems, Inc. v. United States*, 110 Fed. Cl. 612, 618 (2013).

It is clear that when a contracting officer is divested of authority to issue a final decision, there can be no deemed denial of the claim. Accordingly, under the factual circumstances in the instant case, as the contracting officer determined he did not have authority to issue a final decision, there is no failure by the contracting officer to issue a final decision, and therefore no deemed denial of the claim. Without a final decision or deemed denial, we lack jurisdiction in this appeal.

Decision

The appeal is **DISMISSED FOR LACK OF JURISDICTION.**

ALLAN H. GOODMAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

JONATHAN D. ZISCHKAU
Board Judge