

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
ESA South, Inc.) ASBCA Nos. 62242, 62243
)
Under Contract Nos. W9128F-14-D-0014)
W912EP-17-F-0098)

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OPINION BY ADMINISTRATIVE JUDGE MCILMAIL
ON THE GOVERNMENT’S MOTION TO DISMISS
FOR LACK OF JURISDICTION

The government moves to dismiss these appeals for lack of jurisdiction because, it says, the appeals involve fraud (that is, the alleged overbilling of the government on two contracts for emergency, temporary roofing in the aftermath of a 2017 hurricane in Florida). The government points to 41 U.S.C. § 7103(c)(1), which states “[t]his section does not authorize an agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud” (gov’t mot. at 5). The government also cites an opinion of the United States Court of Federal Claims and another of the Civilian Board of Contract Appeals, for its contention that “a contracting officer’s final decision is not valid if it is based upon a suspicion of fraud, and, therefore, there can be no jurisdiction based upon the CDA [Contract Disputes Act] when a contracting officer has a suspicion that a claim involves fraud” (gov’t mot. at 6). We need not decide whether we agree with that contention to decide the government’s motion. The document that the government relies upon and attaches to its January 23, 2020 motion is a letter—also dated January 23, 2020—from the contracting officer to appellant stating:

I will not be issuing contracting officer’s final decisions as requested in your Metal Roof Best Practices claim, dated September 7, 2018, and your ROE Shortfall claim dated

September 25, 2018. The reason for this is that I have a reasonable suspicion that [appellant] made fraudulent misrepresentations as to the amount of blue plastic sheeting that it installed during the Hurricane Irma blue roof mission.

(Gov't mot. at 5 ¶ 13)

These appeals, however, were filed in October 2019, based upon the deemed denial of the 2018 claims that the contracting officer references in his letter; the government admits that “[t]he contracting officer has not rendered a final decision on either of Appellant’s claims” (gov’t mot. at 5 ¶ 11). We do not agree that the contracting officer’s 2020 letter divests us of jurisdiction to entertain these 2019 appeals. If it did, the government presumably could defeat any appeal before this Board simply by presenting to the Board a letter from the contracting officer written after the filing of the appeal articulating the contracting officer’s suspicion that the claim underlying the appeal was fraudulent. We do not agree that section 7103(c)(1) goes that far. Indeed, discussing that section we have said that “[we] have jurisdiction under the CDA to decide the contract rights of the parties even when fraud has been alleged,” “we possess jurisdiction over an appeal if we do not have to make factual determinations of fraud,” and “[t]hat fraud allegedly may have been practiced in the drafting or submission of . . . [a] claim does not deprive this Board of jurisdiction under the CDA.” *Sand Point Servs., LLC*, ASBCA No. 61819, 19-1 BCA ¶ 37,412 at 181,859 (quoting cases). The government quotes *Case, Inc. v. United States*, 88 F.3d 1004, 1009 (Fed. Cir. 1996), for the rule that “when 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” (gov’t mot. at 7), but that case does not involve section 7103(c)(1) (or its predecessor, 41 U.S.C. § 605(a)), much less a contracting officer’s post-appeal articulation that a contractor’s claim is suspected to be fraudulent. We do not find that *Case* controls the outcome here.

Nor do we find the answer in *PROTEC GmbH*, ASBCA No. 61161 *et al.*, 18-1 BCA ¶ 37,010 at 180,244, which the government does not cite but which addresses the operation of the phrase “any claim involving fraud.” There, the government moved to dismiss appeals for lack of jurisdiction, arguing that the contracting officer’s final decisions were invalid—and thus that we lacked jurisdiction—because the basis for denying the claims purportedly was a suspicion of fraud. *Id.* We found that “the [contracting officer’s final decisions] were not even based upon a suspicion of fraud,” and denied the motions. *Id.* Moreover, here appellant’s claims were not denied; rather, the contracting officer never rendered decisions on those claims.

Finally, the government says that “there is still an ongoing fraud investigation, which divests the Board of jurisdiction to consider these appeals” (gov’t reply br. at 2)

(footnote omitted), but that is contrary to what we said in *Todd Shipyards Corp.*, ASBCA No. 31092, 88-1 BCA ¶ 20,509 at 103,682, in which the government was investigating allegations that a contractor had fraudulently charged Navy contracts:

[T]he mere fact that there is an ongoing criminal investigation which involves the same contract or contracts and claims pending before the Board is not enough to divest the Board of jurisdiction if those matters are otherwise properly before the Board.

We said much the same in *PROTEC*:

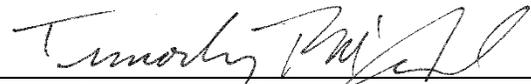
[T]he mere fact that there is an ongoing criminal investigation which encompasses events which were the basis for the contracting officer's decision being appealed is not enough to divest us of jurisdiction.

18-1 BCA ¶ 37,010 at 180,245.

CONCLUSION

The motion is denied.

Dated: June 9, 2020



TIMOTHY P. MCILMAIL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 62242, 62243, Appeals of ESA South, Inc., rendered in conformance with the Board's Charter.

Dated: June 10, 2020



PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals