ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
AAA Engineering & Drafting, Inc.	)	ASBCA Nos. 47940, 48575, 48729
	)	
Under Contract No. F34650-93-C-0114	)	

APPEARANCE FOR THE APPELLANT: J. William Bennett, Esq.
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APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
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OPINION BY ADMINISTRATIVE JUDGE JAMES

These consolidated appeals arise from (i) the contracting officer's (CO) deemed denial of appellant's March 1994, $248,410.15, excessive workload claim (ASBCA No. 47940), (ii) the CO's deemed denial of the $160,226.33 claim balance, after he paid $9,993.82 on pending progress payments, and $78,190 on the claim in September 1994 by contract Modification No. P00003 (ASBCA No. 48575), and (iii) the CO's April 1995 final decision denying said $160,226.33 balance (ASBCA No. 48729). Appellant alleges jurisdiction under the Contract Disputes Act of 1978, 41 U.S.C. § 607. After a five-day hearing on the merits of the appeals including quantum, the parties submitted post-hearing and reply briefs, in which respondent moved, in reliance upon the decision in *Shaw v. AAA Engineering & Drafting, Inc. et al*., 213 F.3d 519 (10th Cir. 2000) (*Shaw v. AAA*), to dismiss the appeals for lack of subject matter jurisdiction or upon the merits upon the basis of an affirmative defense of fraud.

STATEMENT OF FACTS

The decision in *Shaw v. AAA,* on appeal from a judgment in a *qui tam* action brought under the False Claims Act (FCA), 31 U.S.C. §§ 3729-33, includes the following facts and holdings material to this decision:

A. The Contract

> In April 1993 . . . AAA was awarded a government contract (the "contract") to perform photography services at

Tinker Air Force Base ("TAFB") in Oklahoma [1] . . . . Studio photography and most photography development was [sic] performed at TAFB's main photography laboratory (the "main lab"). Additionally, the contract required AAA to provide photography services at the metallurgical laboratory (the "met lab"), where AAA photographers assisted Air Force engineers by taking and developing detailed, technical photographs of failed aircraft parts.

. . . .

B. Work Orders and the Request for an Equitable Adjustment

. . . The contract required AAA to prepare work orders, [Air Force] form number 833, for all the work it performed under the contract. When a customer initially requested photography products or services, a work order would be generated. The customer would record on the work order the type and number of photographs or other products she was requesting and any materials, such as negatives, which she was providing. The work order would be assigned a number for tracking purposes . . . and the AAA employee responsible for the work order would record the work necessary to complete the customer's order . . . .

An AAA employee would then perform the work and record matters such as the number of exposures taken, the amount of film developed, and how many pictures resulted. The finished products would then be packaged together with the work order. The government QAE [Quality Assurance Evaluator] would then have the opportunity to review the work order and the final products, after which the QAE would return the work order and products to AAA. After the customer picked up the finished products, the AAA employee would

1 The court's opinion did not identify the contract number. Appellant's president testified that the contract before the U.S. District Court is the contract in dispute before the ASBCA herein (tr. 401). The Board record contains contract No. F34650-93-C-0114, awarded 24 March 1993, to AAA to provide visual information services at TAFB from "01 Apr 93" to "30 Sep 93," and incorporated by reference the FAR 52.217-8 Option To Extend Services (AUG 1989) clause, allowing a total extension not to exceed six months (R4, tab 1 at 2, 9).

record the type and amount of products actually delivered to the customer. . . .

. . . .

. . . The numbers recorded on the work orders were tallied monthly and the results printed in monthly production reports which AAA was required to submit to the government . . . . The work orders would then be returned to the QAE monthly where they then remained.

. . . .

. . . QAE Brenda Coil . . . would only inspect a portion of AAA's finished production through a method called random surveillance . . . . [A]t the end of each month, a computer program provided Coil with a randomly-generated list of the tracking numbers for the work orders she would inspect during the following month.

. . . .

The contract . . . was later extended through December 1993. The contract called for a fixed monthly payment of $23,240. [2]

. . . .

. . . Technical Exhibit Two to the contract specified the government's estimate of the amount of work AAA would be required to perform for specific tasks. If in the course of its performance AAA believed it was performing more work than indicated in the government's estimates, it could seek an equitable adjustment. Because the numbers recorded on the work orders should reflect the exact amount of work AAA had performed, in order to pursue an equitable adjustment AAA would need to calculate the total of the numbers recorded in the amount produced and amount delivered sections of those forms . . . . If this total exceeded the government's previous production quantity estimates, AAA could use the work orders to support a claim for an equitable adjustment.

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[2] The monthly price for line items 1001 and 1002 was $23,240 (R4, tab 1 at 2).

Indeed, on June 21, 1993, AAA . . . requested an equitable adjustment. AAA first specifically linked this request to the work orders . . . on June 30, 1993 . . . . In January 1994 . . . AAA claimed that it had performed more work than the government's estimates in almost every category of work under the contract.

AAA originally claimed it was entitled to an equitable adjustment of $184,872 for the first six months of the contracting period [and provided a certification] . . . . AAA later adjusted its claim to include . . . the last three months of the contract. The adjusted claim was for $248,410.15, and AAA issued a new certification based on this amount.

. . . [T]he two sides agreed in early 1994 that AAA representatives and government representatives would together count the production quantities recorded on the work orders (the "joint count") . . . however, the attempt to make the count a joint effort soon failed.

. . . .

. . . Thus, at the time of the joint count, no one questioned whether the production quantities on the work orders had been falsely inflated, either when they were originally completed or through subsequent alteration by AAA employees.

. . . .

After the production quantity counts . . . the government offered to settle AAA's equitable adjustment claim for $78,190 . . . . AAA eventually invoiced the government for and received the $78,190 as an equitable adjustment. [The Court's Note 6 stated: "AAA then appealed to the . . . (ASBCA)."] At the time of the settlement offer, the government . . . still did not suspect that information submitted by AAA on the work orders were [sic] falsified to make it appear that AAA had completed more work than it had in fact performed.

. . . .

Prior to trial, it was discovered that some numbers recorded in the production quantity sections of the forms had been visibly altered, and that these and other numbers may have been falsely inflated. Nearly eighty of such work orders were admitted at trial [and also are in SR4, tab 161] . . . . On at least thirteen work orders, the number of prints ordered or the number of prints delivered were [sic] visibly altered . . . . Other work orders displayed mathematical inconsistencies. For example, on one work order the customer requested six prints of three negatives, for a total of eighteen prints, but the work order showed that eighty-four prints had been delivered to the customer.

. . . .

There was additional evidence which place the production quantities recorded on the work orders in doubt. [Debra] Shaw [*qui tam* relator, and ex-AAA employee] testified that three work orders which she had originally inspected had been visibly altered with inflated numbers . . . . Additionally, Sharon Bass, a former AAA employee, testified that . . . [Wilbur] Brakhage [AAA's project manager until June 9, 1993, *see* court's note 1] directed AAA employees to "make the numbers higher," and that the employees complied with that directive . . . . Bass testified that on another occasion, Brakhage directed employees to leave portions of the work orders blank and said that he would complete the quantity produced and quantity delivered to the customer sections himself.

. . . AAA was required to provide the equipment necessary for silver recovery and . . . to dispose of the used fixer and other chemicals in accordance with . . . EPA guidelines and standards. [There was credible evidence that AAA failed to perform those duties, yet invoiced for the full monthly price.]

. . . .

. . . [T]he case went to the jury, which found defendant [AAA] liable for three false claims under the FCA.

. . . .

> Judgment was entered jointly and severally against the Defendants for three times the actual damages found by the jury in the *qui tam* action, or $14,700, plus $15,000 in civil penalties. The district court awarded Shaw . . . $7425, or 25% of the government's FCA award.

(213 F.3d at 523-29, footnotes omitted) The 10th Circuit Court held as follows:

> This evidence gave rise to an inference that the work orders were deliberately or recklessly altered for the purpose of causing the government to pay additional sums in the form of an equitable adjustment. *See* [31 U.S.C.] § 3729(a)(2), (b). There was thus sufficient evidence to support a finding by the jury that some of the work orders were false records submitted in order to get a false claim paid . . . .
>
> . . . .
>
> . . . . [T]his court holds [with respect to the silver recovery issued] that when FCA liability is premised on an implied certification of compliance with a contract, the FCA . . . requires that the contractor knew, or recklessly disregarded a risk, that its implied certification of compliance was false . . . .
>
> . . . .
>
> In sum, because Shaw presented sufficient evidence demonstrating AAA submitted invoices for full payment on the contract knowing it had failed to comply with the silver recovery contract requirements, the district court properly denied AAA's [motions for judgment as a matter of law].

213 F.3d at 530-31, 533, footnote omitted.

AAA was represented in the District Court suit (AR4, tab 195 at 1069, 1123). The Circuit Court affirmed the lower court's FCA judgment against AAA and the other defendants on Shaw's *qui tam* claim, but reversed that judgment on an Oklahoma public policy claim and vacated its award of punitive damages. 213 F.3d at 538. More than 150 days have elapsed after entry of judgment in *Shaw v. AAA* without evidence in the appeal record of any application for *certiorari* to the U. S. Supreme Court.

In these appeals, AAA alleges excessive workload quantities and increased work volume under the contract, and seeks an equitable adjustment of $248,410.15 (ASBCA No. 47940, comp., ¶ 22); or of $160,226.33 (ASBCA No. 48575, comp., ¶ 22; ASBCA No. 48729, comp., ¶ 24). Respondent asserts the defense of falsified AF Form 833 work orders for work performed to defeat AAA's claim (Gov't br. at 94-101).

The court in *Shaw v. AAA* did not limit its holding of falsified work orders to the 80 work orders admitted in evidence. It noted that there was additional evidence of original omissions of production quantities and subsequent entries of inflated quantities by other AAA employees or by AAA's project manager, Wilbur Brakhage.

The district court's FCA judgment did not disclose whether it was based on the falsified work orders or on a second issue, AAA's submission of monthly invoices for full payment, despite AAA's failure to perform its silver recovery obligations during the initial months of contract performance (SR4, tab 162). About 8,080 AF Forms 833 were generated under the contract (SR4, tab 193 at 1).

DECISION

I.

Respondent moves to dismiss the appeals for lack of subject matter jurisdiction on three grounds. (1) In May 2000 the 10th Circuit Court of Appeals affirmed a June 1997 district court judgment according to a jury verdict that some of the work orders AAA had submitted to justify payment of this claim under contract No. F34650-93-C-0114 were false records under the civil False Claims Act, 31 U.S.C. §§ 3729-33. *Shaw v. AAA, supra*. Under the Contract Disputes Act of 1978, 41 U.S.C. § 605(a), agency heads do not have authority "to settle, compromise, pay, or otherwise adjust any claim involving fraud." Since the ASBCA represents the Secretary of the Air Force (per the Government's argument), the ASBCA lacks jurisdiction of these appeals. (2) *Res judicata* or collateral estoppel bars relitigation of the same false work order issues decided in *Shaw v. AAA, supra*. (3) The contract is void because tainted by fraud.

Appellant argues that the three false claims do not correlate with the 13 work orders found falsified in *Shaw v. AAA,* or with those work orders identified as questionable in the ASBCA proceedings, and thus, *Caldera v. Northrop Worldwide Aircraft Services, Inc.*, 192 F.3d 962 (Fed. Cir. 1999), "does not restrict the Board from independent and full consideration of the issues of this case" (app. br. at 32-33).

II.

In *Nexus Const. Co., Inc.*, ASBCA No. 51004, 98-1 BCA ¶ 29,375, we stated:

> Movant's primary contention is that the termination claim submitted by Nexus . . . is fraudulent and, therefore, we have no jurisdiction to entertain this appeal. This contention is incorrect. We clearly have jurisdiction under the Contract Disputes Act of 1978 (CDA) . . . to decide the dispute concerning appellant's entitlement to termination costs . . . . That fraud allegedly may have been practiced in the drafting or submission of such termination claim does not deprive this Board of jurisdiction under the CDA. *Anlagen-und Sanierungstechnik, GmbH*, ASBCA No. 37878, 91-3 BCA ¶ 24,128 at 120,753.

Furthermore, we may consider, for purposes of contractual analysis, determinations of fraud made by other tribunals. *Joseph Morton Co., Inc. v. United States*, 757 F.2d 1273, 1281 (Fed. Cir. 1985), explicated in *Martin J. Simko Const., Inc. v. United States*, 852 F.2d 540, 545-57 (Fed. Cir. 1988). Therefore, we have jurisdiction to decide both AAA's excessive work claim and respondent's *res judicata* or collateral estoppel defense based on the district court's judgment of FCA liability with respect to the contract claims in issue herein. Accordingly, we deny respondent's motion to dismiss for lack of subject matter jurisdiction.

III.

Respondent contends that relitigation of the same false work order issues decided in *Shaw v. AAA* is barred by *res judicata*. The elements of proof of *res judicata*, or "claim preclusion," were identified in *Jet, Inc. v. Sewage Aeration Systems*, 223 F.3d 1360, 1362 (Fed. Cir. 2000):

> [A] second suit will be barred by claim preclusion if (1) there is identity of parties (or their privies); (2) there has been an earlier final judgment on the merits of a claim; and (3) the second claim is based on the same set of transactional facts as the first.

(1) **Identity of parties or their privies**. AAA was a named defendant in *Shaw v. AAA*. For purposes of *res judicata*, the U.S. Government was privy to relator Shaw in that suit. *See In Re Schimmels*, 127 F.3d 875, 882 (9th Cir. 1997). In *Schimmels*, a *qui tam* suit, alleging civil fraud under the FCA against a contractor under a U. S. Government contract, was prosecuted exclusively by the relators. Thereafter, a bankruptcy court held that the summary judgment, entered against the relators with respect to exemption of their FCA award from bankruptcy discharge, had *res judicata* effect against the United States, barring its adversary proceeding against the same defendants to exempt that FCA award. The ninth circuit affirmed the lower court's decision, citing, *inter alia*, RESTATEMENT

(SECOND) OF JUDGMENTS § 37 Comment b, and Reporter's Note, comment (b): "Where, however, the proceedings may be brought by a private party only with the authorization of the responsible public authority, the latter is concluded by the action."

(2) **Final judgment**. The district court's judgment, affirmed by the 10th Circuit Court on 18 May 2000, is valid and final, since more than 150 days have passed without evidence in the appeal record of any application for *certiorari* within 90 days after entry of judgment, or the permissive 60-day extension thereof. *See* 28 U.S.C. § 2101(c); Supreme Court Rule 13.1.

(3) **Same transactional facts.** The relator's FCA claim in *Shaw v. AAA*, and respondent's defense in the ASBCA appeals, are based upon the same set of transactional facts, *viz.*, the falsified AF Form 833 work order entries AAA adduced to support its equitable adjustment claim to the Air Force.

We hold that relitigation of the falsified work orders defense in these appeals is barred by the affirmative defense of *res judicata*.

IV.

The elements of proof of collateral estoppel (issue preclusion) are identified in *Thomas v. GSA*, 794 F.2d 661, 664 (Fed. Cir. 1986):

> (1) the issue previously adjudicated is identical with that now presented, (2) the issue was "actually litigated" in the prior case, (3) the determination of that issue was necessary to the earlier judgment, and (4) the party being precluded was fully represented in the prior action.

The issue of falsified work orders was among the *qui tam* allegations in *Shaw v. AAA* and is a defense in these ASBCA appeals. In *Shaw v. AAA* the falsified work order issue clearly was "actually litigated," *see* 213 F.3d at 530-33, and AAA was fully represented. As to element (3), AAA argues that because one cannot determine whether the district court's FCA judgment was based upon the 13 falsified work orders or upon AAA's invoices requesting the full monthly payment, despite its known failure to perform its silver recovery obligations during initial contract performance, and so the falsified work orders were not "necessary to" the judgment on FCA liability.

However, the appellate court in *Shaw v. AAA* affirmed both grounds for the trial court's judgment. Hence, if a judgment rendered by a trial court is based on a determination of two issues, either of which standing independently would be sufficient to support the result, and the appellate court upholds both of these determinations as sufficient, and accordingly affirms the judgment, the judgment is conclusive as to both determinations.

See 18 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, § 4421; RESTATEMENT, JUDGMENTS, SECOND, § 27, Comment o. Accordingly, we further hold that relitigation of the falsified work orders defense in these appeals is barred by the affirmative defense of collateral estoppel.

V.

There is no allegation of fraud in the inception of contract No. F34650-93-C-0114. However, there is conclusive evidence of fraud perpetrated during its performance affecting the documentation (*viz.*, falsified work orders) of AAA's excessive work load claims that are the subject of these appeals. Moreover, the court in *Shaw v. AAA* did not limit its holding of falsified work orders to the approximately 80 work orders admitted in evidence, but noted that there was additional evidence of original omissions of production quantities, and subsequent entries of inflated quantities by other AAA employees or by AAA's project manager, Wilbur Brakhage. Thus, one cannot isolate the total number of falsified work orders from the 8,080 work orders upon which AAA based its excessive work load claim. Just as falsification of documents with respect to a single change order on a large contract was held to permeate the entire contract so as to justify default termination in *Joseph Morton Co., supra*, so too falsification of work orders in the instant appeals permeated the entirety of the claims.

We hold that the Government's defense of fraud is valid, and requires the denial of these appeals on grounds of public policy. *See Techno Engineering & Const., Ltd.*, ASBCA No. 47471, 94-3 BCA ¶ 27,109 at 135,117 (contractor cannot breach contract by commission of fraud and thereafter recover an equitable adjustment for the same acts, therefore appeal denied); *National Roofing and Painting Corp., U.S. Fidelity & Guaranty Co.*, ASBCA Nos. 36551, 37714, 90-2 BCA ¶ 22,936 at 115,133-34 (appeal denied because performance was tainted by "false, fictitious or fraudulent work orders," 90-2 BCA at 115,132); *Brown Const. Trades, Inc. v. United States*, 23 Cl. Ct. 214, 215 (1991) (Government received summary judgment on two grounds, one of which was commission of a fraudulent act rendering a claim unenforceable on grounds of public policy. "[T]he bribe was paid in connection with a contract modification that involves approximately seven percent of the amount claimed due. But the real concern, of course, is not with the extent of the harm known to have occurred. Rather, it rests with the fact that a corruption in the administration of the contract engenders a suspicion about the integrity of the entire course of dealing. Only through the remedy of nonenforcement can the procurement system free itself of the suspicion of fraud gone undetected"); *cf. United States v. Acme Process Equipment Co.*, 385 U.S. 138, 146 (1966) (public policy requires that the United States be able to rid itself of a prime contract tainted by kickbacks).

We deny the appeals.

Dated: 18 January 2001

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
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. 47940, 48575 and 48729, Appeals of AAA Engineering & Drafting, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals