Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

RESPONDENT'S MOTION TO AMEND ANSWER DENIED;
RESPONDENT'S MOTION FOR SUSPENSION OF
PROCEEDINGS DENIED: October 24, 2005

GSBCA 15502, 16055, 16551

TURNER CONSTRUCTION COMPANY,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Patrick J. Greene, Jr. and Richard L. Abramson of Peckar & Abramson, River Edge, NJ, counsel for Appellant.

Thomas Y. Hawkins, Robert M. Notigan, Richard Hughes, and Amanda Wood, Office of General Counsel, General Services Administration, Washington, DC; and Michael DeChiara, Matthew S. Quinn, Christopher P. McCabe, Michael J. Vardaro, and Michelle Fiorito of Zetlin & DeChiara LLP, New York, NY, counsel for Respondent.

BORWICK, Board Judge.

In these appeals, respondent has submitted a motion to assert affirmative defenses involving allegations of fraud and violations of the Sherman Act. By separate motion respondent seeks a suspension of proceedings. For the reasons set forth below, we deny both motions.

Background

These appeals involve Turner Construction Company (Turner), appellant, and the General Services Administration (GSA), respondent. Respondent contracted with appellant to construct the Federal Building and Courthouse, in Islip, New York.[1] Three consolidated dockets are involved. The first docket, GSBCA 15502, arises from the Government's assessment of liquidated damages. Appellant appealed from that assessment and submitted a complaint seeking remission of liquidated damages.

Appellant submitted a claim for $78,452,427 to the contracting officer and subsequently revised its claim to $85,190,882. After the contracting officer failed to render a decision on the claim, appellant filed an appeal with this Board (GSBCA 16055) from a deemed denial. 41 U.S.C. §§ 605(c)(5), 606 (2000). Appellant submitted a forty-nine paragraph complaint in that appeal. The complaint alleged that numerous design defects caused project delays and additional costs to the subcontractors. Complaint ¶¶ 23-25. Appellant maintained that respondent imposed many changes to the scope of appellant's work, resulting in project delays and additional costs to the subcontractors. Complaint ¶¶ 26-36. Appellant alleged that respondent employed a design review process that resulted in project delays and additional costs to the subcontractors. Complaint ¶¶ 37-44. Appellant alleged that appellant and its subcontractors accelerated performance due to respondent's failure to grant appellant extensions of time. Complaint ¶¶ 45-47. Appellant sought additional compensation under the contract's equitable adjustment clause. Complaint ¶¶ 48-49.

On October 21, 2004, appellant submitted a claim to the contracting officer stating claims based upon superior knowledge, fraudulent inducement, and other grounds for

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[1] The Government managed the construction project with a group of consultants known as the "design team." The design team consists of The Spector Group (TSG)/Richard Meier & Partners (RM&P) (hereinafter TSG/RM&P); Lehrer McGovern Bovis, Inc. (LMB); Syska & Hennessy (S&H); Ysrael A. Seinuk, P.C. (YAS); and R.A. Heintges Architects (RAH). GSA contracted with TSG/RM&P to provide architectural design services for the project and with LMB for quality control construction manager services. TSG/RM&P subcontracted with S&H to provide mechanical, engineering, plumbing, and fire alarm consulting engineering services for the project. YAS and RAH were also subcontractors to TSG/RM&P. YAS provided structural engineering services for the project and RAH provided design services relating to the project's curtainwall.

recovery and sought a contracting officer's decision for additional compensation in the amount of $91,721,782. On November 2, 2004, the contracting officer issued a decision denying the claim. Appellant submitted a timely appeal to this Board, which was docketed as GSBCA 16551. Appellant submitted an amended complaint, in which the first count generally repeated the allegations seeking an equitable adjustment set forth in the original complaint in GSBCA 16055.

In the amended complaint's second count, appellant seeks rescission or reformation and restitution based upon the doctrines of superior knowledge, fraud in the inducement, or mutual mistake. Amended Complaint ¶¶ 50-63. In the amended complaint's third count, appellant seeks reformation or rescission of contract modification 45, which waived certain of appellant's delay claims, on the grounds of failure of consideration, fraud in the inducement, or superior knowledge.

In its original answer, the Government entered the affirmative defenses of waiver, estoppel, and breach of contract due to appellant's alleged failure to seek extensions of time for claimed delays, and waiver, and accord and satisfaction. Answer, First Affirmative Defense ¶ 1.

Now, based largely on what respondent says is testimony before the Board at the hearing on the merits of the docketed appeals, respondent seeks leave to amend its answer to plead certain additional affirmative defenses. We set out respondent's proposed additional affirmative defenses below:

> UNENFORCEABILITY OF CONTRACT DUE TO ILLEGALITY OF AWARD
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> 2. On April 18, 2005, Mark Boyle, Turner's Purchasing Manager, gave sworn testimony before the Board concerning arrangements between Turner and certain of its subcontractors relating to bidding on the Project.
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> 3. Mr. Boyle testified about a document entitled "GSA STRATEGY" (Respondent's Appeal File, Exhibit 5873) produced by Appellant as part of its Project files during discovery. This document reflects Turner's practice of inducing these subcontractors to provide Turner with one price while simultaneously providing a higher price to other general contractors bidding on the Project.
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> 4. Mr. Boyle testified that in preparing its bid for the Project, Turner would "close" with certain subcontractors. Mr. Boyle explained that to "close" meant

that Turner "made a deal going into the -- that we made a commitment to each other going into the bid." Transcript at 728. Mr. Boyle further testified that these bid arrangements were for the purpose of "protecting Turner from the market," and that Turner expected its "closed" subcontractors to give inflated bids to Turner's competition for the Project. Transcript at 735-36.

5. As an example, the GSA STRATEGY document reveals that, as pertaining to the steel bids for the Project: "Ultimately I want to get to every one of the above players [potential steel bidders] and get them to give us their number first on bid day (so we can tell them what to go out with to the other bidders) with the intention to close the job with us going in." (Emphasis added).

6. Mr. Boyle identified several subcontractors that "closed" with Turner for work on the Project: Schindler, Coken and Steelco. Transcript at 735-38.

7. Based on Mr. Boyle's testimony, GSA alleges that Turner "closed" with other subcontractors now bringing claims related to the Project.

8. Mr. Boyle testified that upon closing with a subcontractor, Turner would transmit a brief note memorializing the terms, thereby formalizing the bid arrangement. Transcript at 768. For example, Charles Avolio, Turner's Purchasing Agent, sent a letter to Anthony Panariello of Steelco/Helmark, JV (Steelco) memorializing a verbal agreement regarding Steelco's bid to Turner. This letter states: "In the event Turner is awarded this Project, Turner will enter into an Agreement with Steelco/Helmark, JV in the total amount of $23,550,000.00 that we discussed over the telephone today." Appeal File, Exhibit 2251. This amount, however, constituted a lower bid than what was reflected on Steelco's bid sheet. Respondent's Appeal File, Exhibit 2241.

9. When questioned about the letter, Mr. Panariello stated: "We made an agreement with Turner to do that work for $23,550 [sic]." Transcript at 1583. He further stated: "I believe the conversation went that if he tied the job up with us, we would protect him at this price and not lower our price to the other, his competitors." Transcript at 1585. As a result of this agreement, Steelco bid a higher number to Turner's competitors.

10. In responding to Judge Borwick's questions, Mr. Boyle repeated that the purpose of "closing" was "that [the subcontractors] would be able to give us protection with our competition . . . we would try to get [the subcontractors] to give us an advantage." Transcript at 770.

11. Although Mr. Boyle testified that at certain times a subcontractor would offer to inflate its bid to Turner's competition in order to secure work from Turner, the GSA STRATEGY document reveals Turner's plan to leverage its market position to induce subcontractors to participate in its bid scheme. For example, the document indicates that Turner's aim was to use other large contracts to force the subcontractors into bid arrangements: "We must use the Source, NYME, and Columbia as leverage whereever it may be perceived by the subs as helping them if they help us."

12. Under the Federal Acquisition Regulation (FAR) at 48 C.F.R. 3.303(b), "[t]he antitrust laws are intended to ensure that markets operate competitively. Any agreement or mutual understanding among competing firms that restrains the natural operation of market forces is suspect."

13. Practices or events that may evidence violations of the antitrust laws include: "Assertions by the employees, former employees, or competitors of offerors, that an agreement to restrain trade exists." 48 C.F.R. 3.303(c)(9).

14. Inducing a prospective subcontractor to quote higher prices to other prospective prime contractors to ensure award of the contract is a per se violation of the Sherman Act. 15 U.S.C. § 3 (2005). *Premier Electrical Constr. Co. v. Miller-Davis Co.*, 422 F.2d 1132, 1137 (7th Cir. 1970) [*cert. denied*, 400 U.S. 428 (1970)].

15. GSA is under an obligation to "obtain full and open competition through the use of competitive procedures" in accordance with the requirements of the Federal Acquisition Regulation and Competition in Contracting Act (CICA). 41 U.S.C. § 253(a)(1)(A).

16. Because Turner's conduct prevented full and open competition from taking place, GSA's award of the Contract to Turner was contrary to the statutory and regulatory requirements for award, and thus plainly illegal.

17. When a statute or regulation limits the authority of a Government official to enter into a contract, "the implication of a plain violation of such a statute or regulation is that the contractor cannot enforce the resulting contract against the Government." *Federal Crop Insurance Co. v. Merrill*, 332 US 380 (1947).

18. Because enforcement of the Contract would offend the essential purpose of CICA, Turner cannot enforce the Contract against GSA.

19. Insofar as Turner's claim is predicated on entitlement to relief pursuant to the terms of the Contract, Turner's claim must be denied.

UNENFORCEABILITY DUE TO FRAUDULENT INDUCEMENT

20. Respondent repeats and re-alleges Paragraphs 2 through 11 of the Affirmative Defenses in their entirety.

21. The solicitation for the Contract includes FAR 52.215-16(b) - CONTRACT AWARD (ALT I) CONSTRUCTION (JAN 1991), which states that the Government may reject any or all offers if such action is in the public interest.

22. Had Turner disclosed the facts regarding its collusive bidding practices to the Government, or modified or refused to execute the Certificate of Independent Price Determination, the Government would have reasonably exercised its right, as guardian of the public interest, to reject Turner's offer.

23. Insofar as Turner's claim is predicated on entitlement to relief pursuant to the terms of the Contract, and because GSA was fraudulently induced to award the Contract to Turner, Turner's claim must be denied.

UNENFORCEABILITY DUE TO FALSE CERTIFICATION

24. Respondent repeats and re-alleges Paragraphs 2 through 11 of the Affirmative Defenses in their entirety.

25. As part of its bid package (and subsequent Contract) Turner executed a Certificate of Independent Price Determination, FAR 52.203-2 (APR 1985), certifying in pertinent part:

> (a) The offeror certifies that -
>
> (1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement, with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices offered . . . .

> (3) No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

26. The need for the Certificate of Independent Price Determination "is graphically and vividly illustrated by the case of *Premier Electrical Constr. Co. v. Miller-Davis Co.*, 422 F.2d 1132, 1137 (7th Cir. 1970), *cert. denied*, 400 U.S. 828 (1970), which involved a request by a prospective prime contractor to a prospective subcontractor to quote higher prices to other prospective prime contractors to ensure getting the contract. This obviously is restrictive competition and amounts to illegal collusion." 2-14 Government Contracts: Law, Admin & Proc § 14.160, Matthew Bender & Company, Inc. (2005).

27. Turner's collusive bidding practices, as detailed in the record before the Board, render its subsequent execution of the Certificate of Independent Price Determination knowingly and materially false.

28. Had Turner disclosed the facts regarding its collusive bidding practices to the Government, or modified or refused to execute the Certificate of Independent Price Determination, the Government would have reasonably exercised its right, as guardian of the public interest, to reject Turner's offer. As the Board stated in *Sterling Federal Systems, Inc.*, 90-2 BCA ¶ 22,802, 1990 BPD ¶ 70, when it invalidated an award to an offeror that had made material misrepresentations in its offer:

> [W]e must protect the integrity of the procurement process and disqualify [the awardee's] [from this procurement] . . . . [M]isrepresentation destroys any confidence in any of its representations . . . . Any further consideration of [the awardee's] proposal would provoke "suspicion" and "mistrust" and would "reduce confidence in the competitive procurement process". . . . The integrity of the system demands no less.

90-2 BCA at 114,512-13, 1990 BPD ¶ 70 at 23.

29. Insofar as Turner's claim is predicated on entitlement to relief pursuant to the terms of the Contract, and because the Contract was awarded to Turner in reliance on a Certificate of Independent Price Determination that Turner provided with knowledge of its falsity, Turner's claim must be denied.

INVALIDITY OF CLAIM DUE TO FRAUD

30. Respondent repeats and re-alleges Paragraphs 2 through 11 of the Affirmative Defenses in their entirety.

31. Turner's fraudulent practice of collusive bidding, through which it won the Contract, taints every subsequent claim made in relation to the contract, including Turner's claims for equitable adjustment. *Cf. United States v. Marcus ex rel. Hess*, 317 U.S. 537, 543 (1943) (where original contract was obtained through collusive bidding, initial "taint entered into every swollen estimate which was the basic cause for payment of every dollar paid").

32. Insofar as Turner's claim is predicated on entitlement to relief pursuant to the terms of the Contract, Turner's claim must be denied.

EXCUSE DUE TO PRIOR BREACH--VIOLATION OF FALSE CLAIMS ACT

33. Respondent repeats and re-alleges Paragraphs 2 through 32 of the Affirmative Defenses in their entirety.

34. Turner's false certification and fraudulent inducement of the Government to enter into the Contract are both violations of the False Claims Act (FCA), 31 U.S.C. § 3729(a).

35. Under the FCA, the term "claim" is broadly defined to include "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c). The FCA provides, in pertinent part:

> Any person who
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval; [or] (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government . . .

> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . .

31 U.S.C. § 3729(a).

36. Under the Contract Disputes Act, although the Board lacks jurisdiction to make determinations as to whether or not fraud exists, 41 U.S.C. § 605(a), it can make findings of fact which may indicate that a fraud has been perpetrated, as a necessary part of evaluating evidence. *TDC Management Corp*., DOT BCA No. 1802, 90-1 BCA ¶ 22,627, at 113,492.

37. Pursuant to the illegal agreements between Turner and several of its subcontractors prior to bidding, Turner awarded subcontracts to those subcontractors following award of the Contract.

38. The material breaches committed by Appellant as set forth in the above paragraphs occurred prior to any breaches Appellant alleges the Government committed. Consequently, Appellant is not entitled to recover for any such alleged breaches, as its own improper conduct excuses subsequent alleged breaches by the Government. *Christopher Village, L.P. v. United States*, 53 Fed. Cl. 182 (2002), *aff'd*, *Christopher Vill., L.P. v. United States*, [360 F.3d 1319 (Fed. Cir. 2004), *cert. denied*, 125 S.Ct. 1296 (2005)].

EXCUSE DUE TO PRIOR BREACH--VIOLATION OF ANTI-KICKBACK ACT

39. Respondent repeats and re-alleges Paragraphs 2 through 38 of the Affirmative Defenses in their entirety.

40. The Anti-Kickback Act of 1986 defines "kickback" as:

Any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to a prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract. 41 U.S.C. § 52(2). The Anti-Kickback Act of 1986 further provides that "[I]t is prohibited for any person-

> (1) to provide, attempt to provide, or offer to provide any kickback;
>
> (2) to solicit, accept, or attempt to accept any kickbacks [sic]
>
> (3) to include, directly or indirectly, the amount of any kickback prohibited by clause (1) or (2) in the contract price charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to the United States.

Id., § 53.

41. The Contract contains a provision requiring Turner to comply with the Anti-Kickback Act of 1986.

42. The bid agreements entered into between Turner and certain of its subcontractors during pre-award as described above were established "for the purpose of improperly obtaining or regarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract," 41 U.S.C. § 52(2), and constitute illegal kickbacks in violation of 41 U.S.C. § 53 and in violation of Appellant's contract with the GSA.

WHEREFORE, Respondent respectfully requests that this Board deny the subject appeal.

Respondent's Affirmative Defenses are based on Turner's alleged practice of requiring subcontractors with whom Turner has negotiated a final price for subcontracted work to bid to Turner's competitors about fifteen percent higher than the final negotiated price to Turner for that work. Respondent's motion to raise these affirmative defenses comes well into the fourth month of a trial that is anticipated to last for another three months. Testimony in this matter commenced on April 13, 2005, and continues as of today. Appellant is two or three witnesses from completing its direct case (excluding the Government witnesses it will examine on direct and cross-examine). Appellant awaits the Board's ruling on respondent's leave to amend before calling its last significant witnesses.

Appellant vigorously opposes respondent's motion. Appellant argues that the affirmative defenses that respondent now wishes to include in its amended answer sound in fraud, over which this Board lacks jurisdiction.

Appellant also argues that respondent's motion comes too late, to the severe prejudice of appellant. Appellant's Opposition at 21. Appellant maintains that respondent knew or should have known well before trial about Turner's subcontractor bidding practices, to which Mr. Boyle had testified at trial. *Id*. Appellant, without refutation by respondent, says that no later than November 3, 2003, it gave respondent what respondent regards as the key Turner document--entitled *GSA Strategy*--concerning Turner's subcontractor bid practice, cited by respondent in its proposed amended answer. Appellant's Opposition, Affidavit of Frank A. Hess (Aug. 29, 2005) ¶ 2. The *GSA Strategy* document states:

> the subs that we closed with should be told that we expect them to keep running with us and protect us even more. Ultimately I will have a conversation with each of them that they/will have to hit a number on bid day again depending on what happens.

Later in that document, referring to a specific subcontractor, a Turner official says:

> I have already met with Koehler to help us, I told him [name of Koehler officer omitted] to go out 15% higher to the other bidders.

Hess Affidavit, Exhibit 1.

On May 27, 2004, the Government took the deposition of an official of Turner's structural steel subcontractor, who testified:

> When I bid the $24,841,300, I did not just bid it to Turner, I bid it to other contractors as well. For a consideration of approximately a million dollars, Turner Construction and myself came to the agreement that I would lower the job a million dollars to him and that's not to the other contractors, he would tie the job down with me, in the event he was awarded the contract[,] I would get the contract.

Hess Affidavit, Exhibit 2 at 8 (Deposition of Anthony L. Panariello).

On May 4, 2004, GSA counsel took the deposition of the president of Turner's electrical subcontractor, Coken Electric (Coken), who testified as to an agreement between Turner and Coken that Coken would send out its "first price," a "high price," to other general contractors "to get the word out in the marketplace that Coken will not be low" and that

Turner "will use Coken as its electrical subcontractor."[2] Hess Affidavit, Exhibit 3 at 9, 10 (Deposition of Elaine Barone). On July 9, 2004, respondent's counsel also took the deposition of Turner's purchasing manager, Mark Boyle, but did not explore the issue of Turner's practice in bidding for subcontractors with Mr. Boyle. Hess Affidavit, Exhibit 4 (Deposition of Mark Boyle).

Discussion

Respondent's Motion to Amend Its Answer

Respondent's request for leave to amend and appellant's response present two issues for consideration: (1) whether this Board has jurisdiction over all or some of the new affirmative defenses and (2) whether appellant has been so prejudiced by the allegedly late filing that leave to amend to add those defenses over which we do have jurisdiction should be denied. We consider jurisdiction first.

Our jurisdiction over this appeal is based on the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 607(d) (2000).[3] Section 6 of the CDA provides in part:

> The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another

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[2] We quote these documents for the sole purpose of examining the extent of respondent's knowledge before trial concerning the factual allegations raised in the affirmative defenses of the proposed amended answer. We do not here make findings on appellant's practice in bidding for subcontractors, and the reader should not interpret our discussion as presaging what findings we might make concerning these factual allegations should we be called upon to do so.

[3] That subsection provides: "Each agency board [of contract appeals] shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator [for Federal Procurement Policy] has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims."

> Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, or otherwise adjust any claim involving fraud.

Id.§ 605(a). The United States Court of Appeals for the Federal Circuit has held that it was the intent of the Congress to eliminate fraud cases from the CDA's dispute process. *Martin J. Simko Construction, Inc. v. United States*, 852 F.2d 540, 545 (Fed. Cir. 1988). Consequently, under the CDA, "Congress did not wish the contract appeal boards to exercise any jurisdiction over the issue of the existence of fraud in any form." *Warren Beaves, d/b/a Commercial Marine Services*, DOT BCA 1324, 83-1 BCA ¶ 16,232, at 80,648 (no jurisdiction over contracting officer's decision asserting Government claim under 41 U.S.C. § 604); *see also P.H. Mechanical Corp. v. General Services Administration*, GSBCA 10567, 94-2 BCA ¶ 26,785 (appeal filed after convictions of contractor and its president for fraudulent claim dismissed for lack of jurisdiction). Therefore, an affirmative defense that would turn on a board's finding of fraudulent conduct by appellant is not within our jurisdiction. *Environmental Systems, Inc*., ASBCA 53283, 03-1 BCA ¶ 32,167, *reconsideration denied*, 03-1 BCA ¶ 32,242 (motion to amend answer to plead complete defense to appeal because of alleged False Claims Act violation denied).

In exercising its jurisdiction, a board of contract appeals is not completely isolated from matters touching on fraud, however. A board will have jurisdiction to consider the Government's affirmative defenses that plead a violation of the contract's standard payment clause through submission of false statements and whether there was, for that reason, a material breach of the contract justifying default termination of the contract. *Environmental Systems, Inc*., 03-1 BCA at 159,053. A board also may deny an appeal based upon the prior criminal conviction of the contractor for fraud involving the contract under dispute. *J.E.T.S., Inc. v. United States*, 838 F.2d 1196, 1200-01 (Fed. Cir. 1988); *P.H. Mechanical.*

The proposed affirmative defenses of "Unenforceability of Contract Due to Fraudulent Inducement" (Proposed Amended Answer, ¶¶ 20-23); "Unenforceability Due to False Certification" (*Id.* ¶¶ 24-29); "Invalidity of Claim due to Fraud" (*Id.* ¶¶ 30-32); "Excuse Due to Prior Breach--Violation of False Claims Act" (*Id.* ¶¶ 33-38) and Excuse Due to Prior Breach--Violation of Anti-Kickback Act" (*Id.* ¶ ¶ 39-42) all would turn on the Board's finding of fraudulent conduct, findings we are not empowered to make.

Two of those affirmative defenses ask this Board to find violations of the False Claims Act and the Anti-Kickback Act. Alleged violations of the False Claims Act have been recognized as being outside the CDA's dispute process. *Simko*, 852 F.2d at 547 (False

Claims Act counterclaim excluded from the CDA's dispute process); 41 U.S.C. § 605(a); 28 U.S.C. § 2415 (United States Court of Federal Claims shall specifically find fraud and render judgment of forfeiture in False Claims Act cases.).

Much of the Anti-Kickback Act is also specifically administered and determined by another federal agency. The Anti-Kickback Act generally prohibits any person from providing, attempting to provide, or soliciting, accepting, or attempting to accept any kickback. 41 U.S.C. § 53. The Act prohibits including the amount of any prohibited kickback in the contract price charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to the United States. *Id*. Violations of the Act may constitute crimes punishable by prison or fines, *id*. § 54, and the Government may bring a civil action to recover civil penalties from persons who knowingly violate the act, *id.* § 55. The Anti-Kickback Act is regarded as a fraud statute, the violation of which may make a contract unenforceable. *Christopher Village,* 360 F.3d at 1335-36 (fraud in violation of Anti-Kickback Act resulted in established and uncontroverted breach of contract which excused Government's prior breaches).[4]

The Government, relying upon such cases as *TDC Management Corp*., DOT BCA 1802, 90-1 BCA ¶ 22,627 (1989), argues that this Board has jurisdiction to consider the proposed new affirmative defenses listed above because the Board may make findings of fact which may indicate that a fraud has been perpetrated, "as a necessary part of evaluating evidence." Proposed Amended Answer ¶ 36. Respondent reads too much into *TDC Management*. In *TDC Management*, the board held that it possessed jurisdiction to consider appellant's claim for the balance of allowable costs under a cost contract and the Government's common law counterclaims that the costs were not allowable, in the face of a pending civil fraud suit in the United States District Court. There, however, the fraud issues in the District Court and the Government contract issues before the board were discrete, separate issues. *TDC Management*, 90-1 BCA at 113,494. Thus, the board concluded that it had jurisdiction over breach of contract claims, except for matters of fraud. *Id*. The board, moreover, dismissed the Government claim based upon the False Claims Act. *Id*.

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[4] The contracting officer of the contracting agency may offset the amount of a kickback "provided, accepted or charged," in violation of the Anti-Kickback Act. 41 U.S.C. § 56. In addition, an offset shall be a claim of the Government for the purposes of the CDA. *Id.* § 56(c). Of course, here the Government does not seek such an offset, using the procedures set out in the statute, but only pleads the Anti-Kickback Act as a general fraud count.

The affirmative defenses the Government wishes to plead here are based on an alleged pre-award bid-rigging scheme between appellant and its subcontractors. Unlike the Government affirmative defenses or claims in *Environmental Systems, Inc*. or *TDC Management*, the affirmative defenses here would be based on a Board finding of fraudulent conduct. Unlike *J.E.T.S.*, there is no criminal conviction of fraud on which to base a finding that the contract is unenforceable; rather, there is now pending an investigation by the Department of Justice.

Our decision in *Maritime Equipment & Sales, Inc. v. General Services Administration*, GSBCA 15266, 01-2 BCA ¶ 31,596, is of no assistance to respondent in maintaining its affirmative defenses. We determined there that a contract was awarded in violation of statute and regulation and thus was not enforceable against the Government. However, our decision did not involve any alleged fraud. *Maritime Equipment & Sales*, 01-2 BCA at 156,160 n.2.

The Government's proposed first affirmative defense does not directly implicate fraud; instead, it alleges a violation of the Sherman Act, 15 U.S.C. § 3. Proposed Amended Answer ¶ 14. Respondent maintains that this violation "prevented full and open competition from taking place." *Id.* ¶¶ 15-16. Respondent alleges that because appellant's conduct prevented full and open competition from taking place, appellant may not enforce the contract against the Government. *Id.* ¶¶ 16-19. The claim of "unenforceability due to false certification" also rests upon alleged violation of the Sherman Act. *Id.* ¶¶ 26-32.

Appellant argues that a suit to enforce the Sherman Act would constitute a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another federal agency is specifically authorized to administer, settle, or determine. That being the case, appellant maintains the Board has no jurisdiction of a proposed Government affirmative defense based on an alleged Sherman Act violation. 41 U.S.C. § 605.

Actions to enforce the Sherman Act are vested in the United States Attorneys and the Department of Justice. 15 U.S.C. § 4; 28 U.S.C. § 516. Under the FAR, evidence of suspected antitrust violations are to be reported to the Attorney General, who enforces the Sherman Act, as well as to the debarring and suspending official of the appropriate agency. 48 CFR 3.301, 3.303. An alleged Sherman Act violation comes within the portion of 41 U.S.C. § 605(a) which limits our jurisdiction.

Even if we possessed jurisdiction over an alleged Sherman Act violation, it is questionable whether this Board could remedy such a violation, even if proven, by finding a material breach by appellant that would have excused respondent's alleged breaches. The Supreme Court in *Kelly v. Kosuga*, 358 U.S. 516 (1959), held that alleged violations of the Sherman Act are no defense to an action for breach involving a contract for the sale of onions

because the express remedies of the Sherman Act should not be supplemented judicially by including avoidance of contracts as a sanction. *Kelly*, 358 U.S. at 519; *see also Viacom International Inc. v. Tandem Productions*, 526 F.2d 593, 599 (2d Cir. 1975); *Lewis v. Seanor Coal Co.*, 382 F.2d 437, 441 (3d Cir. 1967). The exception to this principle occurs in situations where both parties to the contract engaged in price-fixing and enforcement of the resulting contract would make the judicial tribunal a party to the very restraints prohibited by the Sherman Act. *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 261 (1909); *Dickstein v. duPont*, 443 F.2d 783, 785-86 (1st Cir. 1971). Here there is no allegation that the Government was a party to the alleged collusive bidding.

The second issue for our consideration as to respondent's request for leave to amend its answer is whether appellant has been so prejudiced by the allegedly late filing that leave to amend to add the defenses should be denied.

Even if we did have jurisdiction over the alleged Sherman Act violation, we would deny respondent's request for leave to amend because appellant has been unduly prejudiced by the late submission of the amendments involving the Sherman Act. Board Rule 107(f) provides that after the filing of the primary pleadings, the Board may allow further amendments upon conditions that are fair to both parties. 48 CFR 6101.7(f) (2004). Allowance of respondent's proposed affirmative defense based upon the Sherman Act now would essentially force appellant to prepare and present a defense to a Sherman Act antitrust suit in the context of a contract appeal and would completely disrupt the ongoing trial. It is evident that respondent came into possession of much of the evidence upon which it now relies during the discovery phase of these appeals in 2003 and 2004. Respondent's argument that the significance of the evidence only became clear after Mr. Boyle's testimony at the hearing on the merits is not convincing. The consequences of the *GSA Strategy* document were apparent at least as early as May 27, 2004, when a subcontractor's official testified at deposition that his low price was for Turner exclusively and not for other contractors. Respondent's request to amend its answer to raise Sherman Act violations simply comes too late. *General Engineering & Machine Works*, DOT BCA 4158, et al., 04-1 BCA ¶ 32,454 (2003); *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Corp.*, 68 F.R.D. 383, 385 (N.D. Ill. 1975).

For the above reasons, we deny for the moment respondent's motion to amend its answer to plead the affirmative defenses quoted above. However, Board Rule 112(e) allows pleading amendments, within the scope of an appeal, to conform to the evidence. Other boards allow amendments to conform to the evidence. *See N & P Construction Co.,* VABCA 2578, et al., 92-1 BCA ¶ 24,447 (1991). Respondent may amend its answer to plead breach of contract, not based on fraud or alleged Sherman Act violations, but based upon clauses within the contract in dispute.

Respondent's Motion for Suspension of Proceedings

Respondent, at the request of the Department of Justice, asks for a six-month suspension of proceedings in these appeals. We have set forth the standard for deciding whether to suspend proceedings in light of a pending fraud investigation:

> In deciding whether to stay these appeals at this juncture, we are called upon to weigh the competing interests of the parties and endeavor to maintain an even balance. *Landis v. North American Co.*, 299 U.S. 248 (1936); see also *Afrco-Lecon v. United States*, 820 F.2d 1198, 1202 (Fed.Cir. 1987). It is well settled that the party seeking a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Landis*, 299 U.S. at 255.

Meredith Relocation Corp., GSBCA 9124, et al., 90-2 BCA ¶ 22,677, at 113,913.

Weighing the competing interests of the parties, we observe that this case has been in trial since April 13, 2005, and the hearing is scheduled to last through mid-January of 2006. The Government's request for suspension of proceedings was submitted on September 16, 2005, and comes when appellant has completed the testimony of most of its witnesses, save for those few who need to be recalled, and during the presentation of the Government's case. Suspension now would mean a loss of momentum for both parties and significant disruption to the schedules of the attorneys and witnesses. Additionally, as we have noted above, it is evident from the record that respondent possessed information about the alleged fraudulent conduct as early as November 2003, with Turner's production to respondent of Turner's *GSA Strategy* document. Certainly by May 2004, with the completion of appellant's witness depositions, respondent could have initiated a fraud investigation well before trial.

Respondent has not convinced us that continuing with these proceedings will harm any pending criminal or civil investigation. As previously discussed, these appeals concern a request for equitable adjustment centered around the quality of the contract drawings and performance of the contract, or breach involving the same factual issues. The alleged fraud concerns pre-bid conduct between appellant's subcontractors and Turner's competitors for the prime contract under what seem to have been informal and unwritten understandings between Turner and its subcontractors. The balance of the interests weighs strongly with proceeding forward with these appeals. Respondent's motion for suspension must be denied.

Decision

Respondent's motions to amend its answer to assert affirmative defenses based upon fraud and violations of the Sherman Act, and for a six-month suspension of proceedings, are **DENIED**. Respondent may submit a motion to amend its answer to conform to the evidence with affirmative defenses that are not based upon fraud or a violation of the Sherman Act.

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ANTHONY S. BORWICK
Board Judge