Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DISMISSED FOR LACK OF JURISDICTION: August 28, 2006

GSBCA 16840

TURNER CONSTRUCTION COMPANY,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

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

Thomas Y. Hawkins, Robert M. Notigan, and Richard Hughes, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **HYATT**, and **DeGRAFF**.

BORWICK, Board Judge.

Background

This docket involves an appeal of a contracting officer's decision seeking recovery from appellant, Turner Construction Company, of an alleged kickback amount.[1] The Anti-

[1] The Board consolidated GSBCA 16840 with the appeals of the equitable adjustment and breach claims, docketed as GSBCA 15502, 16055, and 16551. We consider this docket separately.

Kickback Act, 41 U.S.C. § 56 (2000), provides that such a decision is treated as a government claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613 (2000).

Respondent moves to dismiss this appeal for lack of jurisdiction; respondent argues that only the United States Court of Federal Claims may hear the appeal of the contracting officer's decision. Appellant moves to grant the appeal and deny the claim for failure of the Government to state a claim upon which relief can be granted. Appellant maintains that the alleged pre-award conduct is not covered by the Anti-Kickback Act. Appellant also argues that the existence of a kickback (as opposed to the amount of the kickback) is a matter involving fraud, which is beyond the contracting officer's and the Board's CDA jurisdiction.

We disagree with respondent that the Board would lack jurisdiction over a properly brought claim under 41 U.S.C. § 56. Nothing in the language of the statute limits jurisdiction over such a claim to the United States Court of Federal Claims. We disagree with appellant that the Anti-Kickback Act does not cover appellant's pre-award conduct.

We agree with appellant, however, that under 41 U.S.C. § 56 a contracting officer could not issue a decision that asserts the existence of a kickback in violation of the Anti-Kickback Act as well as the amount of the kickback. However, appellant's arguments go not to the merits of the claim, but to the contracting officer's authority and our jurisdiction to decide it. Instead of denying the appeal, we dismiss the appeal for lack of jurisdiction.

Findings of Fact

The Board considers the following to be facts relevant to jurisdiction.[2] 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. Appeal File, Exhibit 1. Four consolidated dockets are involved. The first docket, GSBCA 15502, arises from the

[2] Both appellant and respondent raise issues of jurisdiction in their motions. The parties must establish, by a preponderance of the evidence, facts which demonstrate that we have jurisdiction to hear this appeal. We are not required to accept the jurisdictional facts alleged by the parties. Instead, we will consider the evidence presented by the parties in their submissions, weigh that evidence, and make our own factual findings concerning jurisdiction. *Land v. Dollar*, 330 U.S. 731 (1947); *Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746 (Fed. Cir. 1988); *Scott v. United States*, 27 Fed. Cl. 829 (1993).

Government's assessment of liquidated damages. Appellant appealed from that assessment and submitted a complaint seeking remission of liquidated damages.

The second docket, GSBCA 16055, concerns claims for increased costs allegedly due to various delays and changes. Appellant initially 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 from a deemed denial. 41 U.S.C. §§ 605(c)(5), 606. 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. *Id*. ¶¶ 26-36. Appellant alleged that respondent employed a design review process that resulted in project delays and additional costs to the subcontractors. *Id*. ¶¶ 37-44. Appellant alleged that appellant and its subcontractors accelerated performance due to respondent's failure to grant appellant extensions of time. *Id*. ¶¶ 45-47. Appellant sought additional compensation under the contract's equitable adjustment clause. *Id*. ¶¶ 48-49.

The third docket is GSBCA 16551. On October 21, 2004, appellant submitted a claim to the contracting officer stating claims based upon superior knowledge, fraudulent inducement, and other grounds for 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.

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.

The Board tried the case between April 11, 2005, and February 21, 2006. During that trial session, a Turner document entitled "GSA Strategy," Appeal File, Exhibit 5873, which is also attachment 1 to the contracting officer's decision of December 20, 2005, was discussed. That document set forth Turner's basic strategy of obtaining low prices from prospective subcontractors with an agreement from the subcontractors that they would bid higher prices to Turner's competitors for the job. For example, the document stated that

Turner encouraged the prospective masonry subcontractor to submit a bid to Turner's competitors that was fifteen percent higher than its bid to Turner. *Id*. On April 18, 2005, Turner's purchasing manager testified about that document. He testified that on bid day, i.e., before the Government's award of the contract to a prime contractor, Turner would agree to do business with the chosen subcontractor at a firm and hopefully low price in exchange for the subcontractor's informal agreement that it would submit higher prices by a certain percentage to Turner's competitors. Transcript at 736, 767-71. The purchasing manager testified that these arrangements were standard in the construction industry. *Id*. at 736.

On August 11, 2005, respondent submitted a motion to amend its answer to raise certain affirmative defenses, including defenses claiming allegations of violations of the Anti-Kickback Act, 41 U.S.C. §§ 51-58, and the Sherman Antitrust Act, 15 U.S.C. §§ 1-7. On September 16, 2005, the Department of Justice advised the Board that it was commencing a civil and criminal fraud investigation arising out of this testimony; respondent requested a six-month suspension of proceedings.

On October 24, 2005, in a one-judge opinion, we denied respondent's request to amend its answer to raise the affirmative defenses and respondent's request for a suspension of proceedings. We concluded that the proposed affirmative defenses raised issues of fraud or antitrust violations, issues which were beyond our CDA jurisdiction. We did, however, state that respondent would be allowed to submit amendments to conform to the evidence, not based upon alleged fraud or antitrust violations. *Turner Construction Co. v. General Services Administration*, GSBCA 15502, et al., 05-2 BCA ¶ 33,118. We denied respondent's motion for suspension of proceedings because of the tardiness of the request, the undue prejudice to appellant arising from the timing of the request in mid-trial, and the lack of a showing that continuing the trial would hinder an on-going civil or criminal investigation. *Id*.

Instead of respondent's submitting amendments to its answer not based upon fraud or violations of the Sherman Antitrust Act, on December 20, 2005, respondent's contracting officer issued a decision purporting to "offset the amount of a kickback against monies owed by the United States to Turner under the Contract" under 48 CFR 52.203-7(c)(4)(i) (2005). The contracting officer, referencing the GSA Strategy document and hearing testimony concerning that document, stated:

> The tying agreements are anti-competitive in that they artificially inflated the bids of Turner's competitors. Turner used its market leverage to restrict other prime contractors' access to that same market.

> As a result, it is hereby determined that the tying agreements entered into between Turner and certain of its subcontractors during the pre-award bidding process of this contract were clearly established "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" in violation of the Contract.

Contracting Officer's Decision, Board File, GSBCA 16840.

The contracting officer calculated an offset of $5,106,844, which was the sum of alleged "kickback amounts" given by three bidding subcontractors, Hickey/Metro JV, Steelco, and Coken. The amounts represented price discounts reflected in those subcontractors' bids to appellant. The contracting officer determined that Hickey/Metro JV's bid to appellant was $41,682,000 and that the alleged kickback amount was $3,108,500, which represented a seven percent discount on that subcontractor's bid to appellant. Similarly, the contracting officer determined that Steelco's bid was $22,066,000 and that Steelco had discounted its bid to appellant by $998,344. Finally, the contracting officer determined that Coken had bid $17,600,000, which represented a $1,000,000 discount. The decision does not make clear how discounts in subcontractor bids to Turner result in allegedly inflated bids of Turner's competitors to the Government. The contracting officer determined that it would be appropriate "to offset the amount of the kickbacks against monies owed by the United States to [appellant] under the Contract."

The contracting officer's decision is styled as a government claim. The decision contains the standard language found in CDA appeals, i.e., that the appellant may appeal within ninety days to the Board or bring an action within twelve months to the United States Court of Federal Claims. Appellant filed an appeal, docketed at the Board as GSBCA 16840.

Discussion

The Anti-Kickback Act defines the term "kickback" to mean:

> Any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided directly or indirectly, to any prime contractor . . . 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 term "prime contract" means:
>
> [A] contract or contractual action entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract.

41 U.S.C. § 52(4). The Act defines a "prime contractor" to mean "a person who has entered into a prime contract with the United States." *Id*. § 52(5). The term "subcontractor" means:

> (A) [A]ny person, other than the prime contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or subcontract entered into in connection with such prime contract; and
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> (B) includes any person who offers to furnish or furnishes general supplies to the prime contractor or higher tier subcontractor.

Id. § 52(8).

The Act prohibits any person from providing, attempting to provide, or offering any kickback, or soliciting, accepting, or attempting to accept any kickback. 41 U.S.C. § 53(1)-(2). The Act also prohibits any person from directly or indirectly including the amount of any kickback in the contract price charged by a subcontractor to a prime contractor or higher tier subcontractor or in the contract price charged by a prime contractor to the United States. *Id.* § 53(3). The Act provides criminal and civil remedies against any person who knowingly engages in conduct which violates section 53. *Id*. § 54-55.

Section 55 of Title 41 of the United States Code provides: "The United States may, in a civil action, recover a civil penalty from any person who knowingly engages in conduct prohibited by section 53 of this title." 41 U.S.C. § 55(a)(1). The civil penalty is twice the amount of each kickback involved in the violation and not more than $10,000 for each occurrence of prohibited conduct. *Id*. § 55(a)(1)(A), (B).

Since the contracting officer's decision was issued under the Anti-Kickback Act's offset authority, we set forth the pertinent parts of the offset authority provision:

> (a) Offset authority
>
> A contracting officer of a contracting agency may offset the amount of a kickback provided, accepted, or charged in violation of section 53 of this title against any moneys owed by the United States to the prime contractor under the prime contract to which such kickback relates.
>
> (b) Duties of Prime Contractor
>
> (1) Upon direction of a contracting officer of a contracting agency with respect to a prime contract, the prime contractor shall withhold from any sums owed to a subcontractor under a subcontract of the prime contractor the amount of any kickback which was or may be offset against that prime contractor under subsection (a) of this section.
>
> (2) Such contracting officer may order that sum withheld under paragraph (1)
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> > (A) be paid over to the contracting agency; or
> >
> > (B) if the United States has already offset the amount of such sums against that prime contractor, be retained by the prime contractor.
> >
> > . . . .
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> (c) Claim of Government
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> An offset under subsection (a) of this section or a direction or order of a contracting officer under subsection (b) of this section is a claim by the Government for the purposes of the Contract Disputes Act of 1978.
>
> (d) "Contracting officer" defined
>
> As used in this section, the term "contracting officer" has the meaning given that term for the purposes of the Contract Disputes Act of 1978.

41 U.S.C. § 56. The Federal Acquisition Regulation substantively tracks the provisions of the Anti-Kickback Act. 48 CFR 52.203-7.

Discussion

Respondent moves to dismiss the appeal docketed as GSBCA 16840 for lack of jurisdiction, arguing that the Anti-Kickback Act intended to limit a contractor's appeal of a contracting officer's offset claim to the United States Court of Federal Claims, not to a board of contract appeals. Respondent's Motion to Dismiss at 15. Respondent relies not on the words of the statute, but on a document in the Congressional Record which is made part of the statement of Senator Levin. The document, which is arranged as if it is a Senate Report but not numbered as such, states that it is the intent of the authors that an appeal of a contracting officer's decision should only be filed at the then-named United States Claims Court, now known as the United States Court of Federal Claims. 132 Cong. Rec. S16307-01 (daily ed. Oct. 16, 1986). The rationale behind the intent is stated to be that "boards' factual determinations are subject to only a limited review in a judicial forum," while the United States Claims Court "may review the kickback claim on a de novo basis." Respondent's Motion to Dismiss at 15.

Appellant argues that under the plain language of the Anti-Kickback Act and the CDA, the offset of the amount of a kickback in a contracting officer's final decision is subject to appeal to the applicable board of contract appeals. Appellant's Response at 4.

The relevant portion of the Anti-Kickback Act, 41 U.S.C. § 56, is silent on the precise CDA forum available to a contractor who desires to appeal a contracting officer's offset decision issued under that section. Therefore, it is appropriate to turn to the canons of statutory construction and legislative history to ascertain the intent in this regard. *Timex V.I. Inc. v. United States*, 157 F.3d 879, 882-83 (Fed. Cir. 1998). The statute states that the contracting officer's offset "is a claim of the Government for the purposes of the [CDA]." 41 U.S.C. § 56(c). The House Report is instructive; it states:

> Further, the Committee intends that the contracting officer's actions and decisions under section 6(b) be governed by the Contract Disputes Act of 1978, in cases of offsets against the contract connected with the kickback or the Debt Collection Act of 1982 in all other circumstances. A prime contractor may seek review under the Contract Disputes Act when it disagrees with a contracting officer's decision or actions under Section 6(b).

H.R. Rep. No. 99-964, at 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5960, 5974.[3]

[3] Section 6 is codified at 41 U.S.C. § 56. Under that section, CDA procedures are applicable to a contracting officer's offset actions under both subsections (a) and (b) of

It is evident from the statutory language and the statement in the House Report that Congress intended that a government claim under 41 U.S.C. § 56 be subject to the full set of procedures available under the CDA. The CDA establishes a contractor's choice of forum--either the appropriate board of contract appeals or the United States Court of Federal Claims--for appealing decisions of contracting officers. 41 U.S.C. §§ 606, 609 ; *Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1562 (Fed. Cir. 1990), *cert. denied*, 499 U.S. 919 (1991); *Grinnell v. United States*, 71 Fed. Cl. 202 (2006). In short, boards of contract appeals and the United States Court of Federal Claims possess concurrent jurisdiction over pure CDA appeals, and also over appeals of contracting officer's decisions made subject to the CDA under 41 U.S.C. § 56.

Had Congress intended to eliminate the concurrent jurisdiction of boards of contract appeals in this type of case, that intention would have been reflected in the language of the Anti-Kickback Act. The omission of any such provision in the statute itself is strong and sufficient evidence that Congress had no such intent. *Yellow Freight System Inc. v. Donnelly,* 494 U.S. 820, 823 (1990) (in Title VII Civil Rights Act case filed in state court, statements in legislative history of Civil Rights Act insufficient to oust state court of presumptive jurisdiction over such cases where statute itself was silent as to the argued-for ouster). The statement in the House Report that the prime contractor may seek review under the CDA, without constraining the forum in which that review might take place, gives further support to our conclusion. Consequently, we assign little weight on this issue to respondent's proffered floor statement. We also note that the floor statement's sole rationale for exclusive review by the United States Court of Federal Claims reflects a misunderstanding of the scope of review of contracting officer's decisions provided by a board of contract appeals under the CDA. Contrary to the suggestion in the floor statement, under the CDA, review of contracting officer's decisions by both the United States Court of Federal Claims and a board of contract appeals is *de novo*. *Wilner v. United States*, 24 F.3d 1397, 1401-02 (Fed. Cir. 1994) (en banc). Such a misapprehension necessarily weakens the reliance we are urged to place on the statement. *Fort Stewart Schools v. Federal Labor Relations Authority*, 495 U.S. 641, 649-50 (1990). The words of the statute plus the authoritative legislative history point to boards of contract appeals having concurrent jurisdiction over offset claims properly brought under the Anti-Kickback Act. Respondent's arguments on this point are not well-founded, and its motion to dismiss based on that basis will be denied.

For several reasons, appellant moves the Board to deny the Government's claim for failure to state a claim upon which relief can be granted. We address the most compelling points. The first argument of appellant is that the Anti-Kickback Act only applies to conduct

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41 U.S.C. § 56, and not just to subsection (b) as stated in the House Report.

after the prime contract has been awarded and that the conduct of which the contracting officer complains occurred before award of the prime contract. Appellant's Motion to Dismiss at 2. Appellant argues that a negotiated price discount cannot be a kickback because the resulting low price achieves the objective of the sealed-bidding process. Appellant maintains that if a negotiated price discount were a kickback, the low bidders on public construction projects would invariably be violators of the Anti-Kickback Act. *Id*. at 3. Appellant maintains that the conduct referenced in the contracting officer's decision would only be a kickback if it is found to be a violation of the Sherman Antitrust Act, a matter which is outside the contracting officer's jurisdiction under the CDA.

In reply to Respondent's Opposition to Appellant's Motion, appellant argues that the contracting officer only possessed jurisdiction to issue a decision on the amount of any kickback, not on the existence of a kickback, because the contracting officer is prohibited by the CDA from considering matters involving fraud. Appellant's Reply at 7.

An offset claim under the Anti-Kickback Act is a claim of the Government. 41 U.S.C. § 56(c). Respondent argues that the Anti-Kickback Act applies to pre-award conduct and that in any event appellant could only consummate the arrangements when the Government selected appellant as the prime contractor. Respondent's Opposition at 6-7. We agree with respondent that the Anti-Kickback Act applies to pre-award conduct. A primary purpose of the Anti-Kickback Act was to prohibit kickbacks made at any point in the government procurement process for the purpose of improperly obtaining favorable treatment. H.R. Rep. No. 99-964, at 11, 1986 U.S.C.C.A.N. at 5968; *United States v. Purdy*, 144 F.3d 241, 245 (2d Cir.), *cert. denied* 525 U.S. 1020 (1998). The definition of prime contractor in 41 U.S.C. § 52(5) as a person who has entered into a prime contract with the Government simply does not create an exemption for a government contractor's pre-award conduct. It is beyond cavil that appellant was the Government's prime contractor for construction of the Islip courthouse. Appellant's pre-award conduct is covered by the Anti-Kickback Act.

This is where matters become interesting. The contracting officer stated that appellant entered into tying arrangements for the purpose of improperly obtaining favorable treatment. In issuing her decision, the contracting officer thereby addressed the existence of a kickback as well as the amount of the kickback. Respondent agrees: "The Final Decision cites [the Anti-Kickback Act's definition of 'kickback'] and then identifies those actions that GSA considers to be kickbacks." Respondent's Opposition at 7. We address the question of whether the contracting officer could render such a decision and this Board determine the existence of fraud under the Anti-Kickback Act consistent with the provisions of both the CDA and the Anti-Kickback Act. In so doing, we must reconcile the provisions at 41 U.S.C. § 605(a) and 41 U.S.C. § 56(a) to make both effective. *Highland Falls-Fort Montgomery Central School District v. United States*, 48 F.3d 1166, 1171 (Fed. Cir.), *cert. denied*, 516

U.S. 820 (1995) (reconciling entitlement statute which required one hundred percent funding with appropriations statute that underfunded entitlement benefit).

Our analysis begins by examining both the purpose of the Anti-Kickback Act and jurisdictional boundaries of the CDA. As noted above, the Anti-Kickback Act generally prohibits any person from providing, attempting to provide, 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, L.P. v. United States*, 360 F.3d 1319, 1335-36 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005) (fraud in violation of Anti-Kickback Act resulted in established and uncontroverted breach of contract which excused Government's prior breaches). However, under the Anti-Kickback Act, a contracting officer may determine the amount of any offset of a kickback provided, accepted, or charged "in violation" of 41 U.S.C. § 53. 41 U.S.C. § 56(a).

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 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.

41 U.S. C. § 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, under the CDA, neither the contracting officer nor the Board may consider whether the tying arrangement amounts to a kickback requiring an offset. *Beech Gap Inc*., Eng. BCA 5585, 95-2 BCA ¶ 27,879,

at 129,076, *aff'd,* 86 F.3d 1177 (Fed. Cir. 1996) (Table) (under CDA board does not determine fraud but is bound by pleas and convictions entered and determined by court of competent jurisdiction); *Hardrives, Inc.*, IBCA 2319, et al., 91-2 BCA ¶ 23,769, at 119,060 (contracting officers and boards do not decide contractor's liability for fraud claims brought by the Government); *cf. Medico Industries Inc.*, ASBCA 22141, 80-2 BCA ¶ 14,983 (in pre-CDA case, contracting officer and Board lacked authority to determine violations of criminal statutes).

Under the Anti-Kickback Act, the authority of the contracting officer is limited to determining the amount of the kickback. Criminal or civil liability and the resulting penalties must be determined in either a criminal or civil action brought in the name of the United States by the Department of Justice in a court of competent jurisdiction. 41 U.S.C. §§ 54, 55; 28 U.S.C. § 516. Consequently, the existence of an Anti-Kickback Act violation is outside the purview of both the contracting officer's authority and our CDA jurisdiction.

Although we would have jurisdiction of a claim for the amount of a kickback under 41 U.S.C. § 56, the contracting officer acted precipitously in issuing her decision as to the existence of an Anti-Kickback Act violation without a finding by a court of competent jurisdiction of either criminal or civil liability for the alleged Anti-Kickback Act violation.[4]

Respondent further maintains that it is necessary that the proper forum resolve all issues of fraud, because the CDA "arguably prevents the Board from issuing judgment on any of the consolidated appeals to the extent that until such claims are adjudicated all [appellant's] claims against [respondent] remain claims 'involving fraud'." Respondent's Motion at 15-16. Respondent thus implies that we should suspend proceedings until issues of fraud are resolved. We note that the Department of Justice advised on September 16, 2005, that it had commenced an investigation of the alleged Anti-Kickback Act violation. As of this date--some eleven months later--the Board has not been informed of either a civil or criminal action resulting from that investigation. Should the Government commence such an action, we will consider any requests by respondent to suspend action in the remaining dockets.

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[4] A criminal conviction would estop a contractor from denying fraud liability in a subsequent Board proceeding when the underlying facts were distinctly put in issue and directly determined in the criminal case. *J.E.T.S. Inc. v. United States*, 838 F.2d 1196, 1200 (Fed. Cir.) *cert. denied*, 486 U.S. 1057 (1998).

Decision

The appeal docketed as GSBCA 16840 is **DISMISSED FOR LACK OF JURISDICTION**.

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ANTHONY S. BORWICK
Board Judge

We concur:

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CATHERINE B. HYATT
Board Judge

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MARTHA H. DeGRAFF
Board Judge