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BOARD PROCEDURES INVOLVING FRAUD COUNTERCLAIMS AGAINST CONTRACTORS

By A. Jeff Ifrah

Since the 1980s, a Federal Government enforcement priority has been eradication of procurement fraud. Recent contracting scandals associated with the Iraq war and reconstruction of the Gulf Coast following Hurricane Katrina have renewed the Government's efforts. Contractors should consider two trends as they contemplate whether and where to adjudicate their claims against the Government. First, there has been a decline in contract administration claims, generally, and a marked decline in filings before agency boards of contract appeals, specifically—a curious trend given the boards' limited jurisdiction over matters of fraud. Second, the increasingly expansive fraud-related jurisprudence of the U.S. Court of Federal Claims has resulted in unprecedented judgments against contractors.

The Government has asserted fraud under the Anti-Kickback Act of 1986,[1] the False Claims Act,[2] and the Forfeiture of Fraudulent Claims Act[3] based on any hint of questionable procurement practices—not simply to disclaim liability on particular claims, but on entire contracts. Indeed, three successive cases decided over the past two years have effectively resulted in forfeitures of over a half billion dollars with corresponding windfalls to the Government.[4]

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It is, therefore, timely for Government contractors to consider potential costs of challenging Contracting Officers' decisions. Other BRIEFING PAPERS have examined the evolution of forfeiture-related jurisprudence[5] and compared dispute resolution generally before the agency boards and the COFC.[6] This PAPER examines the types of conduct the Government has cited to support fraud-based counterclaims and defenses, compares the disposition of such claims by the COFC and the agency boards, and suggests best practices for limiting contractors' exposure to loss due to allegations of fraud.

Impact Of Forum Choice On Exposure To Fraud-Based Remedies

Under the Contract Disputes Act, Government contractors may challenge a CO's final adverse decision in one of two fora. Aggrieved contractors may file an appeal before the appropriate agency board of contract appeals or file suit in the COFC.[7] As analyzed in the May 2006 BRIEFING PAPER, a number of factors influence a contractor's choice of forum, including each forum's caseload, expense, and time to resolution.[8] Over the past several years, another consideration has emerged as potentially pivotal—namely, each forum's jurisdiction to entertain matters of fraud.

■ Asserting Claims Before The Agency Boards

Agency boards have limited jurisdiction over matters of fraud, which necessarily limits the Government's ability to assert counterclaims and affirmative defenses sounding in fraud.[9] Despite this potential advantage to Government contractors, litigation before the boards has been in steady decline over the past 15 to 20 years. Indeed, the early 1980s is now recognized as an expansive era for CDA litigation at the boards. Since then, such litigation has been trending downward and, in the recent past, rapidly so.[10]

As shown in Figure A on the following page, the number of pending appeals before the Armed Services Board of Contract Appeals—the largest board in terms of caseload and staffing—peaked in October 1987 at 2,503.[11] Three years later, the number had inched down to 2,462.[12] By 1997, the number of pending appeals had plummeted to 1,325 and continued to fall over the next five years.[13] By 2002, only 782 appeals were pending before the ASBCA—a 68.8% drop relative to 1987 totals.[14] Similarly, in 1990, appeals docketed at the ASBCA numbered 2,218. Within 12 years, they had dropped by 80.4% to 435.[15]

Data show comparable declines in total numbers of pending and docketed appeals before the General Services Administration Board of Contract Appeals, as shown in Figure B on the following page.[16] The GSBCA was the second largest board in terms of caseload and staffing and the largest civilian agency board until January 6, 2007, when it was consolidated with seven other civilian boards into the Civilian Board of Contract Appeals.[17] In 1982, appeals pending before the GSBCA totaled 716.[18] By 2002, that number had dropped 79.3% to 148.[19] Similarly, docketed appeals in 1982 totaled 593. By 2002, they had dropped 88.5% to 68.[20]

Available data for the other boards tell the same story. The number of appeals docketed and

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Figure A

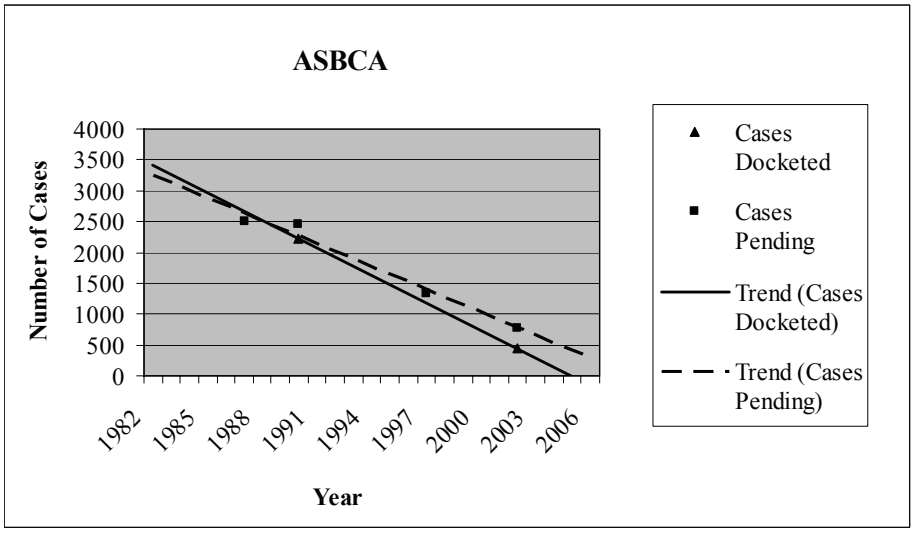


Figure B

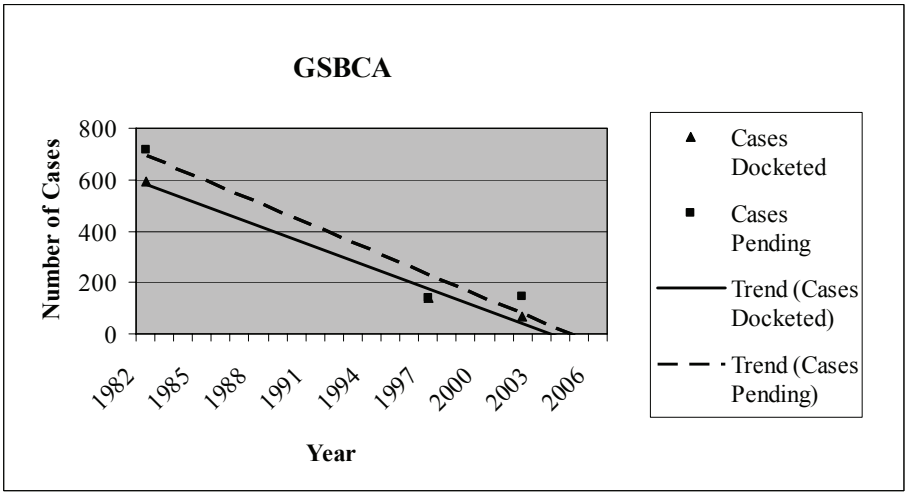
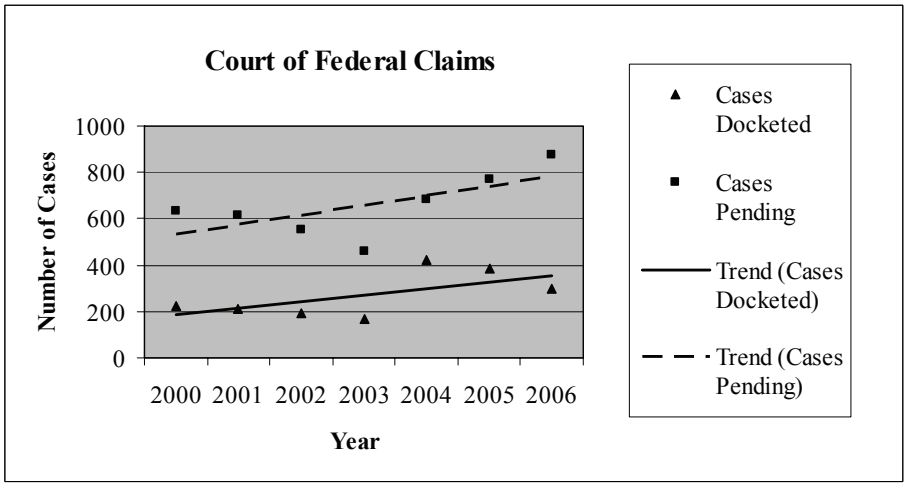


Figure C



pending before the larger boards, including the Department of Agriculture Board of Contract Appeals and the Department of Transportation Board of Contract Appeals,[21] declined steadily from their peaks in the 1980s and early 1990s. Pending and docketed appeals also declined at the smaller boards, such as the Department of Veterans Affairs' Board of Contract Appeals.[22] Like the GSBCA, these three boards were consolidated into the new CBCA.[23]

■ Asserting Claims Before The COFC

In contrast to the declining caseload before the boards, the number of contract cases filed with and pending before the COFC has remained relatively stable, as shown in Figure C on the previous page. (These COFC statistics include bid protest cases over which the COFC gained exclusive jurisdiction in 2001.[24]) Over the past four years, contract cases filed before the COFC have represented a steadily increasing percentage of total cases filed. Specifically, for FY 2003, FY 2004, FY 2005, and FY 2006, the number of contract cases filed represented 5.4%, 17.9%, 23.4%, and 28.3%, respectively, of the COFC's docket.[25]

Impact Of COFC Jurisprudence On Exposure To Fraud-Based Remedies Including Forfeiture

The foregoing data suggest a shift in caseload away from the boards in favor of the COFC. As explained below with reference to the draconian forfeiture result in *Morse Diesel International Inc. v. United States* (*Morse Diesel III*),[26] COFC decisions for 2006 and 2007 may well send contractors back to the CBCA and other agency boards to resolve their claims in hopes of minimizing their risk of loss. Indeed, the Federal Government's recent victory in *Morse Diesel III* represents another high water mark in the Government's aggressive pursuit of fraud—this time in response to claims brought under the CDA. In January 2007, the COFC rendered judgment against contractor Morse Diesel International, Inc. (MDI) under the Anti-Kickback Act of 1986, the civil False Claims Act, and the Forfeiture of Fraudulent Claims Act. Based on Anti-Kickback Act and False Claims Act violations, the COFC concluded that the Forfeiture of Fraudulent Claims Act required MDI to forfeit some 15 claims under four separate contracts. MDI's claims included requests for equitable adjustment, damages totaling roughly $54 million, and declaratory relief. Added to MDI's losses were attorney's fees and costs associated with litigating the claims, as well as penalties it incurred for False Claims Act violations.[27]

■ Evolution Of Forfeiture Jurisprudence

Fifty years ago, the COFC's draconian judgment would have been unimaginable. For nearly a century, the COFC and its predecessor, the Court of Claims, construed the forfeiture statute, now codified at 28 U.S.C.A. § 2514, narrowly. For example, in *Branch Banking & Trust Co. v. United States*, the Court of Claims denied forfeiture of a disputed claim where the contractor had already submitted (and the Government had already paid) fraudulently overstated claims under the same contract.[28] Invoking the legislative history of the predecessor statute, the court explained that only the claim that is fraudulently prosecuted is subject to forfeiture.[29]

The court reversed course seven years later in *Little v. United States*.[30] Applying 28 U.S.C.A. § 2514, the *Little* court held that submission of fraudulent claims under a contract required forfeiture of all other claims submitted under the same contract, even absent a showing that the related claims had been tainted by fraud. Thus began the court's increasingly broad construction of § 2514, which expanded considerably as a result of the *Winstar*-related cases arising out of the savings and loan crisis of the 1980s.[31]

In 2000, the COFC extended the Forfeiture of Fraudulent Claims Act's application beyond cases involving fraudulent presentment of claims to cases involving fraudulent performance of claims. In *Anderson v. United States*, the court required forfeiture under 28 U.S.C.A. § 2514 based on a contractor's fraudulent "performance," a term that itself was construed broadly to include a bank's chief executive officer's commitment to operate a savings and loan thrift in a safe and sound manner.[32] Two years later, in *First Federal Savings Bank of Hegewisch v. United States*, the COFC acknowledged a distinction between fraud in the

presentment of a claim as opposed to fraud in the performance of the underlying contract.[33] The court contemplated that 28 U.S.C.A. § 2514 could require forfeiture in both instances, albeit based on different elements of proof. While the Government must prove all four common-law elements to obtain forfeiture based on fraudulent performance, i.e., (1) knowledge, (2) intent to defraud, (3) reliance, and (4) damages, the Government need only prove the first two to obtain forfeiture based on fraudulent presentment.[34] In 2003, the COFC extended 28 U.S.C.A. § 2514 forfeiture liability yet again, this time to cases involving fraud in contract formation.[35]

■ LISB I & II

Recently, the U.S. Court of Appeals for the Federal Circuit held in *Long Island Savings Bank FSB v. United States* (*LISB I*) that 28 U.S.C.A. § 2514 required a claimant bank to forfeit its entire claim against the Government, including $435.7 million in damages awarded in the proceedings below.[36] According to the Federal Circuit, the bank was required to forfeit its entire claim based on representations the bank's former CEO made over 20 years earlier in connection with the bank's acquisition of a thrift.[37] Specifically, the former CEO had certified that the bank was in compliance with all applicable laws, notwithstanding that he was in violation of New York State's conflict-of-interest regulations—a fact he concealed from the bank.[38] The bank's outside counsel discovered the conflict-of-interest violation years later and promptly reported it to the Government.[39]

Following the Federal Circuit's February 2007 decision, the bank filed a petition for panel rehearing and rehearing *en banc*. Acting *en banc*, the court returned the case to the original panel for revision.[40] On September 13, 2007, the panel withdrew and vacated its February 2007 decision and, again, reversed the COFC's decision, this time on two alternative grounds (*LISB II*).[41] First, the Federal Circuit held that the Government's claim under the Forfeiture of Fraudulent Claims Act implicitly raised a federal common- law claim of fraud in the inducement as well as fraud in the performance of the contract.[42] Because the bank CEO's misrepresentations tainted the contract at its inception, the contract was void *ab initio*.[43] The bank's claims were precluded because the Government could not have breached a contract that was void at its inception.

The panel denied the bank's claims on alternative grounds, holding that the Government was not liable to the bank based on the federal common-law doctrine of prior material breach.[44] According to the Federal Circuit, the bank's certifications constituted "uncured material failure of performance," which excused the Government's nonperformance.[45] Notably, the Federal Circuit's decision completely side-stepped the analysis of the Government's case under the Forfeiture of Fraudulent Claims Act.

Either way, the Federal Circuit's decisions in favor of the Government effectively required the bank to forfeit all of its claims. The court's decision in *LISB I* is notable, first, for its explication of a truncated, two-pronged inquiry whereby the Government's case in fraud under the Forfeiture of Fraudulent Claims Act may be proved on a showing of knowledge and intent only. The Government need not prove justifiable reliance or injury.[46] The court's revised analysis in *LISB II* under the federal common-law theory of fraud in the inducement addressed a third prong—causation.[47] The court found the requisite causal link based on the affidavit of the Government's supervisory agent who was responsible for evaluating whether LISB's acquisition of the failing thrift should be approved.[48] The agent's affidavit stated that if he had known the nature and substance of the bank's CEO's kickback scheme, he would have recommended against it.[49]

Second, the *LISB I* decision is remarkable in its treatment of certifications made by the bank's former CEO as submitted "claims" for purposes of 28 U.S.C.A. § 2514, a ruling that elides the distinction between false statements and false claims.[50] In its revised decision in *LISB II* based on common-law fraud, the court avoided that question altogether.

Finally, the Federal Circuit's holdings in *LISB I* and *LISB II* are remarkable for their imputation of knowledge and intent to satisfy the first two prongs of both truncated tests.

While the Government failed to prove either that the claimant bank had actual knowledge of the former CEO's misrepresentations or that the bank intended to defraud the Government, the court nevertheless imputed the CEO's knowledge and intent to the bank and, on that basis, denied the bank's entire claim.[51] Accordingly, a contractor may forfeit claims based upon "employee conduct that it does not even know about, that the employee(s) involved may have actively concealed for years, and that the contractor first uncovers years later and promptly self-reports to the Government."[52]

Based on the COFC's recent forfeiture-related jurisprudence, contractors may question whether the agency boards represent a more favorable alternative for the resolution of contract disputes, particularly when their claims may implicate matters of fraud. Before choosing to file their claims with the boards rather than the COFC, contractors should consider the boards' treatment of claims when the Government asserts counterclaims and defenses touching on matters of fraud.

Impact Of Board Decisions On Exposure To Fraud-Based Counterclaims & Defenses

In contrast to the COFC, agency boards have taken a narrower view as to the extent to which allegations of fraud operate to taint claims under the same contract or related contracts. Under the CDA, agency boards have jurisdiction to "decide any appeal from a decision of a contracting officer."[53] CDA § 6, in turn, limits the authority of COs to decide contractors' claims against the Government and expressly excludes the authority to "settle, compromise, pay, or otherwise adjust any claim involving fraud."[54] Consistent with the intent of Congress to eliminate fraud cases from the CDA's disputes process,[55] agency boards have narrowly construed their jurisdiction over contract disputes involving fraud.

As discussed in more detail below, when agency boards consider disputes implicating matters of fraud, the boards analyze whether and to what extent the alleged taint of fraud touches upon the particular claims in dispute. Consistent with the COFC's pre-*Little* jurisprudence, the boards do not readily find that a taint of fraud as to one claim taints every claim under the same contract. The boards' reluctance to lump all such claims together may favor contractors vulnerable to allegations of fraud.

Even so, contractors should be aware that, "[w]hen litigation is commenced at a board in a case that the Government believes involves fraud, the Government will frequently pursue its fraud allegations in U.S. district court in an effort to obtain a fraud judgment against the contractor."[56] Usually, the Government requests the board to stay litigation pending the district court's disposition of the case.[57] However, stays are not automatically granted. The Government "'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 [it] prays will work damage to someone else.'"[58] In cases where the Government's request for a stay is denied and litigation proceeds simultaneously before the agency board and district court, the board's assertion of jurisdiction over claims not specifically tainted by fraud may not prove to be advantageous. Whether or not continued proceedings before the board make sense depends on, among other things, (a) the Government's allegations in district court, (b) the remedies it seeks, and (c) judicial precedent in the relevant jurisdiction. (Analysis of fraud-related jurisprudence in federal district court is beyond the scope of this PAPER.)

The discussion that follows analyzes decisions rendered by two civilian boards—the GSBCA and the DOTBCA—and one defense agency board, the ASBCA. As noted above, the GSBCA and the DOTBCA were two of eight civilian boards that were consolidated into the CBCA in January 2007.[59] The holdings of the eight predecessor boards are binding as precedent on the CBCA.[60]

Formerly, the ASBCA had jurisdiction to hear appeals from certain civilian agencies. As of January 6, 2007, ASBCA lost its authority to hear such cases in new appeals, with the exception of National Aeronautics and Space Administration contract appeals.[61] The CBCA has not addressed the precedential weight that is to be accorded ASBCA decisions.

■ GSBCA & DOTBCA: Predecessors To The CBCA

Before being subsumed into the CBCA, the GSBCA distinguished claims directly tainted by fraud from claims under the same contract that were not so tainted. Where possible, the GSBCA dismissed the former for lack of jurisdiction and entertained the latter.

In *Turner Construction Co.*, the GSBCA held that allegedly fraudulent prebid conduct did not operate to taint a contractor's claims against the Government pertaining to contract performance.[62] In that case, the contractor filed three claims requesting equitable adjustments based on costs it incurred due to design defects and project delays in connection a construction contract.[63] Initially, the Government entered affirmative defenses of waiver, estoppel, and breach of contract.[64] After testimony before the board, the Government sought to amend its answer to plead violations of the False Claims Act and the Anti-Kickback Act based on the contractor's prebid "tying" arrangements with subcontractors.[65] The Anti-Kickback Act prohibits the offer, solicitation, payment, or receipt of "any money, fee, commission, credit, gift, gratuity, or thing of value, or compensation of any kind" for the purpose of "improperly obtaining or rewarding favorable treatment" in connection with a prime contract or subcontract and prohibits contractors from directly or indirectly including the amount of any such "kickback" in the contract price.[66] In addition to civil and criminal penalties,[67] the Act provides for the contracting agency to administratively offset the amount of the kickback against any moneys owed to the prime contractor, which must then withhold the amount of the kickback from the offending subcontractor.[68]

The GSBCA denied the Government's motion to amend, stating that "an affirmative defense that would turn on a board's finding of fraudulent conduct by [the contractor] is not within our jurisdiction."[69] The board considered important the distinction between the Government's affirmative defenses, which were related to the contractor's allegedly fraudulent prebid conduct, and the contractor's claims, which pertained to contract performance.[70] The GSBCA retained jurisdiction to hear the claims pertaining to contract performance because the issues presented were segregable from the counterclaims touching on matters of fraud.

Months later, in connection with the same contract, the CO determined that the prebid tying arrangements amounted to kickbacks that should be offset against the contract price.[71] The contractor appealed, and the claim was consolidated with the three claims pending before the GSBCA.[72]

The Government contended, in response to the contractor's fourth claim, that the CDA precluded the GSBCA from issuing judgment on *any* of the consolidated claims. According to the Government, all of the contractor's claims were tainted by fraud due to its tying arrangements.[73]

The GSBCA disagreed. While the board dismissed the fourth claim for lack of jurisdiction, it retained the other three which requested equitable adjustments based on design defects and project delays.[74] The board held that the CO's determination that a kickback existed exceeded the agency's authority.[75] However, if a court of competent jurisdiction had made such a finding, the board would have jurisdiction under the Anti-Kickback Act to determine the value of the kickbacks for purposes of offsetting them against the contract price.[76]

In contrast, in *P.H. Mechanical Corp.*, the GSBCA held that it did not have jurisdiction to entertain claims touched by fraud that had already been "conclusively established."[77] In that case, the GSBCA dismissed a contractor's quantum claim where the contractor's submission of that claim served as the basis for a conviction under the False Claims Act in federal district court.[78] Because a court of competent jurisdiction had determined that the claim was fraudulent, the board was precluded from settling, compromising, paying or adjusting it.[79]

There is an apparent tension between *P.H. Mechanical* and *Turner Construction.* Dicta in *Turner Construction* states that the board would have jurisdiction to determine the amount of a kickback for purposes of offsetting it against the contract price as long as the existence of a kickback has been determined by a court of competent jurisdiction.[80] *P.H. Mechanical* seems to require a different result. Because an Anti-Kickback Act violation is,

by definition, an act of fraud,[81] a "conclusively established" Anti-Kickback Act violation would seem to preclude the board's jurisdiction for purposes of determining the amount of the kickback. While the Anti-Kickback Act expressly provides that "[a] contracting officer of a contracting agency may *offset* the amount of a kickback,"[82] it does not give the CO authority to determine the *amount* of the kickback. Perhaps it is ultimately a matter of the boards' discretion. Once a court of competent jurisdiction has made a finding of fraud, the potential consequences before the boards range from the result in *Turner Construction* to the outcome in *P.H. Mechanical*.

Like the GSBCA, the DOTBCA resolved questions of jurisdiction by distinguishing which particular aspects of a claim were touched by fraud from those that were not. In *TDC Management Corp.*, the DOTBCA concluded that it had jurisdiction over the contractor's claim for cost reimbursement under a contract for the development of a bonding program, notwithstanding that a related claim that implicated matters of fraud was pending in federal district court.[83]

For its part, the contractor argued that costs it claimed in excess of the agreed upon maximum were incurred at the agency's direction.[84] The Government countered that the DOTBCA was required to suspend proceedings because the contractor's presentation of vouchers for payment was tantamount to perpetration of fraud on the Government.[85] In support of its allegations, the Government cited to a Defense Contract Audit Agency's audit that (1) stated that the contractor would not or could not produce documentation to support certain costs and (2) questioned the reasonableness and allocability of other costs.[86] The Government contended that, because the audit raised the possibility that the contractor's claim was tainted by fraud, the board lacked jurisdiction to hear the claim.[87]

Additionally, the Government argued that the DOTBCA was required to suspend proceedings until the conclusion of the Government's civil fraud case in federal district court.[88] In federal district court, the Government asserted fraud under the same contract based on different allegations. There, the Government alleged that the contractor's monthly progress reports under the contract misrepresented that certain agreements had been reached and that documents had been distributed to various parties.[89] The Government charged that the contractor used the fraudulent reports in violation of the False Claims Act to induce the Government to make payment.[90]

Before the DOTBCA, the Government invoked the issues of fraud raised in its district court claim to argue that the contractor's cost-reimbursement claim under the same contract was tainted by fraud. As a result, the Government contended, the board did not have jurisdiction to hear the claim. The DOTBCA disagreed. The board asserted jurisdiction over the contractor's cost-reimbursement claim because the issues presented in the claim were distinct from, albeit related to, the fraud-related issues in the district court case.[91] Indeed, jurisdiction over the reimbursement claim was proper under the CDA for purposes of determining the actual amount of reimbursement due the contractor under the contract.[92] The board acknowledged, "[t]his jurisdiction inherently includes the authority to determine that certain invoiced costs are not allowable even if the effect of such a determination is to make out a de facto finding of fraud."[93] Under the CDA, the board had authority in the context of factfinding to assess whether proffered evidence had been falsified; such authority did not encroach upon the exclusive province of courts of competent jurisdiction to determine whether fraud existed as a matter of law entitling the Government to statutory remedies.

The board's decision emphasized that the contractor's cost-reimbursement claim was not directly tainted by fraud. Nowhere had the Government's district court complaint alleged that the contractor submitted fraudulent invoices for costs it did not incur or that it incurred through improper arrangements.[94] "The only fraud alleged [was] that the progress reports were not accurate and truthful."[95]

Moreover, the Government's district court complaint had not requested forfeiture of the contractor's claims under the Forfeiture of Fraudulent Claims Act, a request that could have mooted consideration of the contractor's cost-reimbursement claim.[96] At worst, the contractor

could be held liable in district court for penalties under the civil False Claims Act and denied reimbursement by the DOTBCA for unreasonable and unallocable costs. At best, the contractor would escape liability under the False Claims Act and would be awarded reimbursement for part or all of its cost overruns. In any case, the contractor was not at risk of losing every claim it had under the bond program contract.[97]

Similarly, in *Warren Beaves d/b/a Commercial Marine Services*, the DOTBCA parsed two components of a CO's assessment against a contractor to find that it had jurisdiction to hear part of the contractor's appeal.[98] Specifically, the board determined that it had jurisdiction to entertain the contractor's appeal regarding the amount assessed for work not performed but lacked jurisdiction to hear the contractor's appeal regarding the amount assessed for costs that were allegedly unsupported in violation of CDA § 5 requirements. In the board's words, the "presence of fraud or misrepresentation of fact issue does not preclude [the board's] exercising jurisdiction over all other issues and facets of the parties' claims."[99]

■ ASBCA

Just as the GSBCA and DOTBCA denied the Government's counterclaims and affirmative defenses requesting dismissal of contractors' claims for lack of jurisdiction or suspension of proceedings based on the allegations of fraud, the ASBCA has held that it has jurisdiction to hear a contractor's appeal of a termination for default, even where the Government's affirmative defenses allege that the contractor's falsification of progress payment requests constitutes additional grounds for termination.[100] In *Environmental Systems, Inc.*, the ASBCA's jurisdiction to determine whether termination for default is appropriate based on a contractor's allegedly falsified submissions did not translate into jurisdiction to determine whether the contractor's submissions constituted "false claims" under the False Claims Act.[101] Like the GSBCA, the ASBCA disclaims any authority to hear affirmative defenses that turn on the board's finding of fraud as defined under criminal and civil statutes such as the False Claims Act and the Anti-Kickback Act.

Finally, the board decisions discussed above indicate that fraudulent conduct with respect to one aspect of a contractor's claim does not necessarily taint other aspects of the same claim, much less different claims under the same contract. Going one step further, the ASBCA held in *Giuliani Associates, Inc.* that fraudulent conduct under one contract did not operate to taint similar contracts performed at the same time, at the same location, by the same company, with the same personnel, and with several of the same subcontractors and vendors.[102]

Case Study: Morse Diesel III

The board of contract appeals decisions cited in this PAPER demonstrate that the boards' analysis of potentially tainted contract claims is akin to the reasoning employed by the COFC before its decision in *Little v. United States*.[103] Given the COFC's recent forfeiture-related jurisprudence, it is timely to consider whether contractors that are vulnerable to allegations of fraud before the COFC might fare better adjudicating all of their claims before the boards. This PAPER does so below in the context of the COFC's most recent forfeiture decision—*Morse Diesel III*.[104]

■ Factual Background

From July 15, 1994 to July 19, 1995, the GSA awarded MDI four fixed-priced contracts: (1) a contract to excavate the building site and construct the foundation and core wall for a federal courthouse in St. Louis (STL Phase I Contract), (2) a contract to complete construction of the St. Louis federal courthouse, including a build-out option (STL Phase II Contract), (3) a contract to conduct seismic and electrical upgrades at the U.S. Customs House in San Francisco (SFO Contract), and (4) a contract to construct the core and shell of the U.S. Courthouse and Federal Building in Sacramento (Sacramento Contract).[105]

Based on the GSA's notice to proceed, MDI commenced Phase II construction, including for the build-out option. Months later, the GSA revised the Phase II plans and deleted the build-out. The GSA advised MDI to treat the change as a partial termination for convenience. When MDI requested reimbursement for costs it had already

incurred, the GSA refused.[106] After the parties' failed attempts to negotiate a resolution, the GSA converted the termination for convenience into termination for default.[107]

On May 5, 1999, MDI filed a complaint in the COFC under the STL Phase II Contract seeking damages of nearly $500,000 for the Government's alleged breach of contract in deleting the build-out work.[108] In addition to its May 5, 1999 claim, MDI filed nine appeals with GSBCA, many of which were entirely unrelated to the STL Phase II Contract. For example, in December 1995, MDI claimed compensation for scheduling delays and reimbursement for removal of obstructions and special waste in connection with the STL Phase I Contract.[109] In 2003, MDI claimed damages in connection with the Sacramento Contract.[110] MDI also filed five claims with the COFC. One claim filed with the COFC pre-dated the May 5, 1999 claim. That claim, filed on December 4, 1998, requested reformation of the STL Phase I Contract and related damages.[111] Nearly a year later, the COFC transferred the claim to the GSBCA.[112] In 2006, all of the claims pending before the GSBCA were transferred back to the COFC to be consolidated under the May 5, 1999 claim.[113]

Thus, upon filing its May 5, 1999 claim regarding the Phase II Contract, MDI unwittingly exposed itself to the extraordinary forfeiture remedies imposed by the COFC. As the court had warned in a prior decision: "[A] plaintiff bringing a claim in the [COFC] subjects itself to the possibility of a judgment against it on *any* set-off, claim, or demand the government may have against it."[114] As described in more detail below, several of MDI's business practices provided the bases for the Government's aggressive assertion of counterclaims and defenses sounding in fraud. In the end, MDI's practices would cost it every claim under the four contracts, resulting in a substantial windfall to the GSA.

■ Anti-Kickback Act Of 1986

First, MDI's May 5, 1999 claim under the STL Phase II Contract was vulnerable to the Government's allegations of fraud due to a commission-splitting arrangement between MDI's parent company, AMEC, p.l.c., and its exclusive bond broker. Several years before MDI was awarded the four contracts, AMEC terminated its business relationship with one of two bond brokers it used to obtain payment and performance bonds.[115] Up until that time, the two brokers had split all fee commissions resulting from MDI's bond business. As part of the new exclusivity agreement, AMEC was to receive the terminated broker's split, including on commissions for bonds MDI obtained in connection with at least three of the four Government contracts.[116] Notably, AMEC retained authority to approve or reject MDI's choice of bond broker.[117]

AMEC's commission-splitting arrangement provided the basis for the Government's counterclaims under the Anti-Kickback Act of 1986. They were "the first adjudicated by the [COFC] under the comprehensive scope of the Anti-Kickback Act of 1986."[118] As described above, the result of the Act[119] is to "impose liability on any person who makes a payment to any other person involved in the federal procurement process for the purposes of obtaining favorable treatment."[120]

In a 2005 decision (*Morse Diesel I*), the COFC found that MDI had violated the Anti-Kickback Act under all four Government contracts based on its parent company's acts. According to the COFC, "the record clearly established that the purpose of the fee commission splitting arrangement was to 'cement' [the broker's] business relationship with AMEC, p.l.c. and MDI."[121] The bond broker agreed to split its commissions with AMEC to induce it and MDI to continue and expand their business dealings with the broker. The court quoted with approval the Government's argument likening AMEC's split to a gratuity that the broker paid AMEC in exchange for MDI's bond business.[122] Thus, the COFC concluded, the "fee commission splitting arrangement was 'for the purpose of improperly obtaining or rewarding favorable treatment'"[123] in violation of the Anti-Kickback Act.

The court entered an order as to its legal determinations and reserved for a later date a determination as to civil penalties and other relief.[124] Two years later, the COFC relied on its holding in *Morse Diesel I* to require forfeiture of

the claims under the Forfeiture of Fraudulent Claims Act, as discussed below.

■ False Claims Act

The second and third aspects of MDI's questionable bond payment practices provided bases for the Government's counterclaims under the False Claims Act in connection with all four contracts. Specifically, the Government alleged that AMEC provided indemnification to MDI's sureties for any losses MDI might incur on its performance and payment bonds.[125] In return, AMEC asked MDI to bill the Government twice the normal amount for bond costs; the overage was collected by MDI and paid to AMEC.[126]

Further, MDI submitted six progress payments under each of the four contracts, which included amounts for bond costs. MDI's bond costs, in turn, included AMEC's 50% commission split as well as MDI's indemnity payment to AMEC.[127] MDI supported the payment requests with invoices that were stamped "Paid," notwithstanding that MDI did not pay them until weeks, and in some cases months, later.[128] As required under the contracts, MDI submitted pro forma certifications stating that the amounts requested were "'*only* for performance in accordance with the specifications, terms and conditions of the contract[s].'"[129]

It is important to note that, before the COFC's decision in *Morse Diesel III*, the Government had prosecuted MDI for submission of the payment requests, bond payment invoices, and certifications under two of the contracts. Regarding the STL Phase I Contract, MDI pled guilty to one criminal False Claims Act[130] violation before a federal district court in Missouri.[131] Regarding the SFO Contract, MDI pled guilty to violating the Major Fraud Act of 1988[132] in a federal district court in California.[133] The Government relied on these same facts to support its counterclaim in response to MDI's May 5, 1999 claim under the STL Phase II Contract, not simply to disclaim liability as to that particular claim, but to avoid liability on every claim MDI had filed with the GSBCA and COFC under the four contracts.[134]

"To establish liability under [the civil False Claims Act], the Government [must] prove by a preponderance of the evidence that: the contractor presented for payment a claim; the claim presented was asserted against the Government; the contractor knew that the claim was false; and the contractor intended to deceive the Government by submitting the claim."[135] As applied to MDI, the COFC concluded that MDI's progress payment requests under all four contracts were fraudulent because they requested payment "not *only* for performance of each of the contracts at issue, but were inflated to include the 'rebate' amount that by prearrangement the bond brokers subsequently paid to [MDI's] parent, AMEC."[136] Additionally, MDI fraudulently submitted unpaid invoices that were stamped "Paid" along with certifications stating that MDI had invoiced the GSA only for actual costs MDI incurred under the contract.[137] As such, "[MDI's] progress payment application for performance and payment bonds and certifications on each of the contracts at issue were false and knowingly used by [MDI] to get a fraudulent claim paid by the Government in violation of the False Claims Act."[138]

The COFC's conclusion with respect to the STL Phase I and Phase II Contracts was based, in part, on MDI's earlier guilty plea to one violation of the criminal False Claims Act in district court.[139] The COFC's determination as to the SFO Contract was based, in part, on MDI's guilty plea to one violation of the Major Fraud Act in district court.[140] The COFC found that the Sacramento Contract violated the False Claims Act based on the Anti-Kickback violations it found in *Morse Diesel I*.[141] In that case, as noted above, the COFC held that MDI violated the Anti-Kickback Act based on AMEC's 50% split of proceeds for bonds MDI obtained to satisfy bond requirements under the Sacramento Contract.[142] In *Morse Diesel III*, the COFC noted that procurement regulations clearly state that a kickback is by definition an act of fraud.[143] The COFC's determinations as to the Anti-Kickback Act and False Claims Act allegations provided grounds for the court's ultimate remedy—forfeiture of all claims under the Forfeiture of Fraudulent Claims Act.

■ Forfeiture Of Fraudulent Claims Act

The Government argued its most aggressive counterclaim under the Forfeiture of Fraudulent Claims Act. As noted above, MDI's May 5, 1999

claim before the COFC requested damages of nearly $500,000 for work it had performed under the STL Phase II Contract based on the GSA's notice to proceed.[144] The Government counterclaimed that the Forfeiture of Fraudulent Claims Act required MDI to forfeit every one of its claims under the four contracts because MDI had knowingly submitted false certifications to the GSA in support of reimbursement claims for bond costs on all four contracts.[145] Thus, the Government contended, all of MDI's claims—including nine unrelated appeals before the GSBCA that had already been transferred to the COFC and consolidated with five COFC claims under the May 5, 1999 claim—were subject to forfeiture.

The Forfeiture of Fraudulent Claims Act provides that a "claim against the United States shall be forfeited…by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof. In such cases, the United States Court of Federal Claims shall specifically find such fraud or attempt and render judgment of forfeiture."[146] By itself, the statutory text requires forfeiture of a claim against the Government if fraud is committed or attempted *in pursuit* of that particular claim. It does not expressly require forfeiture of all claims under one contract based on a taint of fraud as to a single claim. Nonetheless, the COFC's recent Forfeiture of Fraudulent Claims Act jurisprudence has extended its reach far beyond the plain language of the statute.

With respect to MDI's 15 claims, the COFC agreed with the Government that the Forfeiture of Fraudulent Claims Act required total forfeiture.[147] One by one, the COFC disposed of each claim based on the Anti-Kickback Act violations established with respect to the Sacramento Contract in *Morse Diesel I* and the guilty pleas of criminal fraud that MDI entered in connection with the STL Phase I Contract, the STL Phase II Contract, and the SFO Contract. In the end, MDI's claim for roughly a half million dollars resulted in forfeiture of approximately $54 million.

■ Minimizing Risks Of Loss—Adjudication Before The Boards

Applying the boards' reasoning as set forth in the cases discussed earlier in this PAPER, might adjudication before the relevant agency board—at that time the GSBCA—have resulted in a more favorable outcome for MDI? In particular, the GSBCA's reasoning suggests that MDI may have avoided forfeiture if it had pursued all of its claims before the board. Assuming the Government would have attempted to assert fraud-based defenses before the GSBCA, the board's decision in *Turner Construction* suggests that the GSBCA would not have allowed them.[148] Just as the GSBCA in that case refused to hear the Government's allegations of fraud in connection with the contractor's prebid tying arrangements, the GSBCA likely would have refused to entertain allegations that MDI's bond payment practices amounted to perpetration of fraud.

Further, certain of MDI's claims that did not directly touch on matters of fraud may have been resolved in its favor. Just as the cost-reimbursement claims in *Turner Construction* were allowed to proceed notwithstanding the Government's Anti-Kickback Act allegations, MDI's claims for equitable adjustments may have proceeded so long as MDI's evidentiary support did not include invoices and certifications related to MDI's bond payment practices. Indeed, MDI's claims for compensation due to scheduling delays and removal of obstructions and special waste ultimately may have been resolved in its favor.

On the other hand, certain of MDI's claims may have been dismissed for lack of jurisdiction. In accordance with *P.H. Mechanical*,[149] the GSBCA likely would have dismissed any of MDI's claims that were directly related to MDI's guilty pleas in federal district court admitting to violations under the False Claims Act and the Major Fraud Act. If MDI had filed its May 5, 1999 claim with the GSBCA—wherein MDI alleged the GSA's breach of the STL Phase II contract—MDI's December 2000 guilty plea in connection with that contract likely would have precluded the GSBCA's jurisdiction to hear the claim.

Turning to the DOTBCA, the board's reasoning in *TDC Management*[150] indicates that if MDI had filed all its claims with the GSBCA, the GSBCA may have awarded reimbursement on claims that were not directly tainted by MDI's questionable bond payment practices. Just as TDC's potentially fraudulent progress reports

did not operate to taint its reimbursement claim before the DOTBCA, MDI's bond payment practices would not have tainted MDI's claims for compensation due to scheduling delays and removal of obstructions and special waste under the STL Phase I Contract.

Further, if MDI had appealed the CO's termination for default before the board, the GSBCA may well have exercised its jurisdiction to examine whether a reasonable basis existed for the CO's decision. As ASBCA's decision in *Environmental Systems,*[151] makes clear, the Government would have been precluded from asserting counterclaims under the Forfeiture of Fraudulent Claims Act; thus, MDI would not have been exposed to forfeiture remedies, including forfeiture of its claim requesting declaratory judgment to convert a termination for default into termination for convenience.

Finally, in cases such as MDI's involving questionable business practices that touch upon multiple unrelated contracts, resolution before agency boards may prove advantageous as compared to the COFC. Based on the ASBCA's reasoning in *Giuliani Associates* noted above,[152] litigation before the GSBCA could have prevented all of MDI's contracts from being lumped together based on bond payment practices that were common to all. Unlike the COFC, the board may have treated each of the four contracts separately for purposes of determining jurisdiction and resolving the substantive issues in dispute. For example, the GSBCA likely would not have relied on a finding of fraud with respect to the SFO Contract—regarding which MDI had no pending claims—to dismiss MDI's claims under the St. Louis Phase I and II Contracts and Sacramento Contract.

GUIDELINES

These *Guidelines* are intended to assist contractors in preparing to defend against potential assertion by the Government of fraud-based claims, including under the Forfeiture of Fraudulent Claims Act. They are not, however, a substitute for professional representation in any specific situation.

1. Fully assess the value of the disputed claim and, when appropriate, get input from legal advisors and accounting experts regarding sophisticated accounting issues.

2. Investigate any fraudulent conduct potentially associated with the claim, whether recent or in the company's distant past. Interview contracting personnel to establish whether there is any alleged or reported impropriety related to contract formation, performance, or pursuit of claims under the contract.

3. Consider the likelihood that the Government will assert counterclaims or affirmative defenses based on allegations of fraudulent conduct.

4. Determine whether other claims are pending before the COFC or agency board of contract appeals in connection with the same contract. Remember that transfer of claims from agency boards and/or district court to the COFC could subject each claim to forfeiture remedies.

5. Analyze recent board decisions to determine whether an agency board is likely to (a) dismiss all or part your claim for lack of jurisdiction, (b) hear all or part of your claim and disallow defenses sounding in fraud, or (c) hear all or part of your claim and entertain fraud-based defenses, such as for purposes of assessing evidence or determining whether termination for default is reasonable. In such cases, the board cannot make findings of criminal or civil fraud as a matter of law.

6. If you have claims pending before an agency board and the Government raises allegations of fraud, demonstrate that the alleged fraud does not touch your claims.

7. If the Government raises fraud during a proceeding or independent of an active proceeding, immediately begin discussions with the Government. When negotiating with the Government to resolve fraud-related disputes, discuss with the prosecutor any contract claims you have. Obviously the best-case result would be an agreement that resolves the Government's fraud concerns and permits the contractor's contract claims to proceed as separate and distinct matters.

★ REFERENCES ★

1/ 41 U.S.C.A. §§ 51–58. See generally Goddard, "Business Ethics in Government Contracting—Part I," Briefing Papers No. 03-6 (May 2003); Irwin, "Ethics in Government Procurement/Edition III," Briefing Papers No. 99-8 (July 1999).

2/ 31 U.S.C.A. § 3729 et seq. See generally Brackney & Solomson, "Current Issues in False Claims Litigation," Briefing Papers No. 06-10 (Sept. 2006); Silberman, "False Claims Issues in Subcontracting," Briefing Papers No. 06-8 (July 2006); Huffman, Madsen & Hamrick, "The Civil False Claims Act," Briefing Papers No. 01-10 (Sept. 2001); Goddard, "Business Ethics in Government Contracting—Part II," Briefing Papers No. 03-7 (June 2003).

3/ 28 U.S.C.A. § 2514. See generally Stouck & Caplen, "The Forfeiture of Claims Act Today," Briefing Papers No. 07-9 (Aug. 2007).

4/ See Long Island Sav. Bank, FSB v. United States, 476 F.3d 917 (Fed. Cir. 2007), 49 GC ¶ 72 (LISB I), withdrawn and vacated, No. 2006-5029, 2007 WL 2685640 (Fed. Cir. Sept. 13, 2007) (reaching the same disposition as the previous opinion on other grounds) (LISB II); Morse Diesel Int'l, Inc. v. United States, 74 Fed. Cl. 601 (2007), 49 GC ¶ 73, revised, No. 99-279C (Fed. Cl. filed June 29, 2007) (Morse Diesel III); Daewoo Eng'g & Constr. Co. v. United States, 73 Fed. Cl. 547 (2006). See generally Nash, "Forfeiture of Claims: A Significant Government Weapon," 21 Nash & Cibinic Rep. ¶ 21 (May 2007).

5/ Stouck & Caplen, "The Forfeiture of Claims Act Today," Briefing Papers No. 07-9 (Aug. 2007).

6/ Schaengold & Brams, "Choice of Forum for Contract Claims: Court vs. Board/Edition II," Briefing Papers No. 06-6 (May 2006).

7/ 41 U.S.C.A. §§ 606, 609(a).

8/ Schaengold & Brams, "Choice of Forum for Contract Claims: Court vs. Board/Edition II," Briefing Papers No. 06-6 (May 2006).

9/ See 41 U.S.C.A. § 605(a); see also Schaengold & Brams, "Choice of Forum for Contract Claims: Court vs. Board/Edition II," Briefing Papers No. 06-6, at 10–11 (May 2006); Schaengold & Brams, "A Guide to the Civilian Board of Contract Appeals," Briefing Papers No. 07-8, at 7 (July 2007).

10/ Lees, "Consolidation of Boards of Contract Appeals: An Old Idea Whose Time Has Come?" 33 Pub. Cont. L.J. 505 (2004).

11/ Id. at 527.

12/ Id.

13/ Id.

14/ Id.

15/ Id.

16/ Id.

17/ See National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 847, 119 Stat. 3136, 3391 (2006). See generally Schaengold & Brams, "A Guide to the Civilian Board of Contract Appeals," Briefing Papers No. 07-8 (July 2007).

18/ See Lees, "Consolidation of Boards of Contract Appeals: An Old Idea Whose Time Has Come?" 33 Pub. Cont. L.J. 505, 527 (2004).

19/ Id. at 528.

20/ Id.

21/ Id. at 531.

22/ Id.

23/ See National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 847, 119 Stat. 3136, 3391 (2006). See generally Schaengold & Brams, "A Guide to the Civilian Board of Contract Appeals," Briefing Papers No. 07-8 (July 2007).

24/ Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(d), 110 Stat. 3870, 3875 (1996); see 28 U.S.C.A. § 1491(b).

25/ See Judicial Business of the United States Courts 2003–2006 (Annual Reports of the Director of the Administration Office of the United States Courts), available at http://www.uscourts.gov/judbususc/judbus.html (site last visited Aug. 28, 2007).

26/ Morse Diesel Int'l, Inc. v. United States, 74 Fed. Cl. 601 (2007), 49 GC ¶ 73, revised, No. 99-279C (Fed. Cl. filed June 29, 2007).

27/ The Government's aggressive tactics took their toll. In the middle of litigation, on or about March 11, 2004, MDI's foreign parent company announced that it would begin a controlled exit from the U.S. construction business due to "the risk and low margin on this activity leading to losses in recent years." See Morse Diesel Int'l, Inc. v. United States, 66 Fed. Cl. 788, 789 (2005), 47 GC ¶ 342 (Morse Diesel I).

28/ Branch Banking & Trust Co. v. United States, 87 F. Supp. 777 (Ct. Cl. 1950).

29/ See id. at 779 ("To interpret the provision to require the forfeiture of a non-fraudulent claim honestly prosecuted is to torture the plain meaning of that provision and disregard the manifest intent of Congress.").

30/ Little v. United States, 152 F. Supp. 84 (Ct. Cl. 1957).

31/ Stouck & Caplen, "The Forfeiture of Claims Act Today," Briefing Papers No. 07-9, at 3, 7–9 (Aug. 2007) (citing United States v. Winstar Corp., 518 U.S. 839 (1996), 38 GC ¶ 322).

32/ Anderson v. United States, 47 Fed. Cl. 438, 446–48 (2000).

33/ First Fed. Sav. Bank of Hegewisch v. United States, 52 Fed. Cl. 774 (2002).

34/ See id. at 790–91.

35/ American Heritage Bancorp. v. United States, 56 Fed. Cl. 596 (2003).

36/ Long Island Sav. Bank, FSB v. United States, 476 F.3d 917, 933 (Fed. Cir. 2007), 49 GC ¶ 72, withdrawn and vacated, No. 2006-5029, 2007 WL 2685640 (Fed. Cir. Sept. 13, 2007) (reaching the same disposition as the previous opinion on other grounds).

37/ Id. at 920.

38/ Id. at 923–24.

39/ Id. at 923.

40/ Long Island Sav. Bank, FSB, 2007 WL 2685640, at *1.

41/ Id.

42/ Id. at *8.

43/ Id. at *14–15.

44/ Id. at *15.

45/ Id.

46/ Long Island Sav. Bank, FSB, 476 F.3d at 926.

47/ Long Island Sav. Bank, FSB, 2007 WL 2685640, at *14.

48/ Id.

49/ Id.

50/ Long Island Sav. Bank, FSB, 476 F.3d at 927.

51/ Id. at 928–33; Long Island Sav. Bank, FSB, 2007 WL 2685640, at *12–13.

52/ Stouck & Caplen, "The Forfeiture of Claims Act Today," Briefing Papers No. 07-9, at 5–6 (Aug. 2007).

53/ 41 U.S.C.A. § 607(d).

54/ 41 U.S.C.A. § 605(a).

55/ See Martin J. Simko Constr., Inc. v. United States, 852 F.2d 540, 545 (Fed. Cir. 1988).

56/ Schaengold & Brams, "Choice of Forum for Contract Claims: Court vs. Board/Edition II," Briefing Papers No. 06-6, at 10 (May 2006).

57/ See id.

58/ Turner Constr. Co. v. General Services Admin., GSBCA 15502, 05-2 BCA ¶ 33118, at 164,124 (citing Landis v. North Am. Co., 229 U.S. 248, 255 (1936)).

59/ National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 847, 119 Stat. 3136, 3391 (2006). See generally Schaengold & Brams, "A Guide to the Civilian Board of Contract Appeals," Briefing Papers No. 07-8 (July 2007).

60/ See Business Mgmt. Research Assocs., Inc. v. General Services Admin., CBCA 464, 07-1 BCA ¶ 33486 ("[W]e hold that the holdings of our predecessor boards shall be binding as precedent in this Board.").

61/ National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 847(d)(2), 119 Stat. 3136, 3391 (2006) (amending 41 U.S.C.A. § 607); see Schaengold & Brams, "A Guide to the Civilian Board of Contract Appeals," Briefing Papers No. 07-8, at 2–3 (July 2007).

62/ Turner Constr. Co., GSBCA 15502, 05-2 BCA ¶ 33118.

63/ Id.

64/ Id. at 164,117.

65/ Id. at 164,120–21; see Turner Constr. Co., GSBCA 16840, 06-2 BCA ¶ 33391, at 165,547 (explaining that, under the tying agreements, the contractor "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 [the contractor's] competitors.").

66/ 41 U.S.C.A. §§ 52(2), 53; see FAR 3.502, 52.203-7.

67/ 41 U.S.C.A. §§ 54, 55(a); 18 U.S.C.A. § 3571.

68/ 41 U.S.C.A. § 56.

69/ Turner Constr. Co., GSBCA 15502, 05-2 BCA ¶ 33118, at 164,122.

70/ See id. at 164,124.

71/ Turner Constr. Co., GSBCA 16840, 06-2 BCA ¶ 33391, at 165,548.

72/ Id. at 165,547.

73/ Id. at 165,552.

74/ Id. at 165,552 ("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.").

75/ Id. ("[T]he 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…violation.").

76/ Id.

77/ P.H. Mech. Corp., GSBCA 10567, 94-2 BCA ¶ 26785, at 133,209.

78/ Id.

79/ Id. at 133,210.

80/ Turner Constr. Co., GSBCA 16840, 06-2 BCA ¶ 33391, at 165,552.

81/ See FAR 52.203-7, para. (a)

82/ 41 U.S.C.A. § 56(a) (emphasis added).

83/ TDC Mgmt. Corp., DOTBCA 1802, 90-1 BCA ¶ 22627.

84/ Id. at 113,488.

85/ Id. at 113,490–95.

86/ Id. at 113,487–88.

87/ Id. at 113,490–95.

88/ Id. at 113,491.

89/ Id. at 113,489–90

90/ Id.

91/ Id. at 113,495.

92/ Id.

93/ Id.

94/ Id. at 113,494.

95/ Id. at 113,490.

96/ Id. at 113,494.

97/ See id. at 113,493–94.

98/ Warren Beaves d/b/a Commercial Marine Servs., DOTCAB 1324, 83-1 BCA ¶ 16232.

99/ Id. at 80,648; see 41 U.S.C.A. § 604.

100/ Environmental Sys., Inc., ASBCA 53283, 03-1 BCA ¶ 32167; Range Tech. Corp., ASBCA 51943, 03-2 BCA ¶ 32290, at 159,773 ("[W]e do not read the Government's proposed fraud defense to require us to decide whether appellant has violated the False Claims Act,...a determination we would have no jurisdiction to render. Rather, the proposed defense requires us to decide whether appellant breached the contract by submitting a false invoice and making false representations about its ability to make delivery which induced the Government to make the second advance payment and to extend the delivery schedule.").

101/ Environmental Sys., Inc., ASBCA 53283, 03-1 BCA ¶ 32167, at 159,053.

102/ Giuliani Assocs., Inc., ASBCA 51672, 03-2 BCA ¶ 32368, 45 GC ¶ 398.

103/ Little v. United States, 152 F. Supp. 84 (Ct. Cl. 1957).

104/ Morse Diesel Int'l, Inc. v. United States, 74 Fed. Cl. 601 (2007), 49 GC ¶ 73, revised, No. 99-279C (Fed. Cl. filed June 29, 2007).

105/ Morse Diesel, No. 99-279C, slip op. at 8–10 (Fed. Cl. filed June 29, 2007).

106/ Id. at 9.

107/ Id. at 10.

108/ Id. at 36.

109/ Id. at 41.

110/ Id. at 39.

111/ Id. at 44.

112/ Id.

113/ See Morse Diesel Int'l, Inc. v. United States, 66 Fed. Cl. 801 (2005) (Morse Diesel II).

114/ Americold Corp. v. United States, 28 Fed. Cl. 747, 750 (1993) (emphasis added).

115/ See Morse Diesel, No. 99-279C, slip op. at 11 (Fed. Cl. filed June 29, 2007).

116/ Id.

117/ Id.

118/ Morse Diesel Int'l, Inc. v. United States, 66 Fed. Cl. 788 (2005).

119/ 41 U.S.C.A. §§ 51–58.

120/ United States v. Purdy, 144 F.3d 241, 244 (2d Cir. 1998).

121/ Morse Diesel, 66 Fed. Cl. at 799–800.

122/ Id. at 800.

123/ Id. at 801; see 41 U.S.C.A. §§ 52(2), 53.

124/ Morse Diesel, 66 Fed. Cl. 788, 801.

125/ Morse Diesel, No. 99-279C, slip op. at 11 (Fed. Cl. filed June 29, 2007).

126/ Id.

127/ Id. at 13.

128/ Id. at 13–14.

129/ Id. at 14 (quoting FAR 52.232-5).

130/ 18 U.S.C.A. § 287.

131/ See United States v. Morse Diesel Int'l, Inc., No. 00CR 00552 (E.D. Mo. Dec. 12, 2000).

132/ 18 U.S.C.A. § 1031.

133/ See United States v. Amec Constr. Mgmt., Inc. f/k/a Morse Diesel Int'l, Inc., No. 2:01 CR00502-1 (E.D. Cal. Nov. 20, 2001).

134/ Morse Diesel, No. 99-279C, slip op. at 36–45 (Fed. Cl. filed June 29, 2007).

135/ Id. at 30; see 31 U.S.C.A. §§ 3729(a)(1), (2), 3731(c)).

136/ Morse Diesel, No. 99-279C, slip op. at 33 (Fed. Cl. filed June 29, 2007).

137/ Id. at 17.

138/ Id. at 34 (citing Commercial Contractors, Inc. v. United States, 154 F.3d 1357, 1362 (Fed. Cl. 1998)).

139/ Id. at 36–46.

140/ See id. at 33.

141/ Id. at 40.

142/ Morse Diesel Int'l, Inc. v. United States, 66 Fed. Cl. 788, at 799–800 (2005).

143/ Morse Diesel, No. 99-279C, slip op. at 34 (Fed. Cl. filed June 29, 2007); see FAR 52.203-7, para. (a).

144/ Morse Diesel, No. 99-279C, slip op. at 36 (Fed. Cl. filed June 29, 2007).

145/ Id.

146/ 28 U.S.C.A. § 2514.

147/ Morse Diesel, No. 99-279C, slip op. at at 35-46 (Fed. Cl. filed June 29, 2007).

148/ See Turner Constr. Co., GSBCA 16840, 06-2 BCA ¶ 33391, at 165,552.

149/ P.H. Mech. Corp., GSBCA 10567, 94-2 BCA ¶ 26785.

150/ TDC Mgmt. Corp., DOTBCA 1802, 90-1 BCA ¶ 22627.

151/ Environmental Sys., Inc., ASBCA 53283, 03-1 BCA ¶ 32167.

152/ Giuliani Assocs., Inc., ASBCA 51672, 03-2 BCA ¶ 32368, 45 GC ¶ 398.