

## A Contractor's FCA Settlement Agreement is Not Evidence of Fraud that Will Void a Contract

Litigation Alert

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The Civilian Board of Contract Appeals (the Board) recently issued an opinion *Regiment Constr. Corp. v. Dep't of Veterans Affairs*, CBCA 6449 (Oct. 1, 2020), denying the Department of Veterans Affairs (VA) motion for summary judgment and holding that the contractor's False Claims Act (FCA) settlement with the Department of Justice (DOJ) did not support a finding of fraud. While the Board does not have jurisdiction to decide fraud claims under the Contract Disputes Act (CDA), there has been a trend in recent years of the government asserting fraud as an affirmative defense in CDA claims. Here, in good news for contractors, the Board rejected the VA's argument that the FCA settlement agreement, which expressly denied any liability on the part of the contractor, was evidence of a previous determination that the contractor committed fraud. This case is a good reminder to contractors to pay close attention to the language of any settlement agreement with the government. [A copy of the opinion is available here.](#)

### Background

The contractor in this matter was awarded a service-disabled veteran-owned small business (SDVOSB) set-aside contract for piping replacement at a VA healthcare facility in New York state. In 2019, the contractor submitted a certified claim and request for equitable adjustment and later appealed to the Board. *See Regiment*, at 2.

Both the VA and the contractor asked to suspend proceedings before the Board on several occasions so that they could engage in settlement discussions and the parties were near to a settlement when the contractor entered into a separate settlement agreement with the DOJ related to allegations that the contractor misrepresented its status as a SDVOSB. *Id.* at 3, 5.

Following the settlement agreement with the DOJ, the VA filed a motion for summary judgment, asking the Board to find that the contractor had committed fraud and therefore the contract was void *ab initio*. The basis for the government's motion was the DOJ-executed settlement agreement, as well as a VA Office of Inspector General (OIG) referral for suspension and debarment and a DOJ press release. *Id.* at 2. The contractor filed a motion to strike the VA's motion for summary judgment, claiming that it had been injured and prejudiced by the VA's "failure to raise the affirmative defenses of fraud and contract voidness until after extended settlement negotiations and [contractor's] incurrence of substantial legal fees as [contractor] would have employed a different legal strategy had the defenses been raised earlier." *Id.* at 3.

### Summary of Decision

**The VA's Motion for Summary Judgment:** The Board found that that the VA's argument was "devoid of merit" and that the motion and supporting documentation did not "evidence a previous determination that [the contractor] committed fraud." *Id.* at 5. Specifically, the Board found that the FCA settlement did not contain a finding or admission of fraud and actually included language specifically disclaiming liability on the part of the contractor and reserving the contractor's right to pursue the government in connection with the work performed (*see e.g.*, "[t]his Settlement is neither to be construed as an admission of liability by [contractor], who dispute[s] the merits of the allegations . . ."; "Nothing in this Paragraph . . . shall be construed as releasing [contractor]'s claims against any federal agency in connection with the work performed by [contractor]"). *Id.* at 5-6. The Board, therefore, found that there was still a dispute of material fact that precluded summary judgment.

**Contractor's Motion to Strike:** The Board also denied the contractor's motion to strike, noting that the Board has "allowed initial pleading of an affirmative defense in a motion for summary judgment absent prejudice to the opposing party." *Id.* at 3. The Board explained that while it recognized that the contractor had expended resources on the settlement negotiations before the VA

asserted its affirmative defense, the contractor had not been prejudiced because it had an "opportunity to respond fully to the affirmative defense in its opposition to the motion for summary judgment." *Id.* at 3.

## Takeaways

The principal takeaway from this case is that the Board will not consider an FCA settlement agreement, which expressly denies any liability on the part of the contractor, as evidence of a previous determination of fraud that will void a contract in a related CDA matter. Going forward, contractors should take comfort in the Board's rejection of the VA's argument, but still pay close attention to the language of any settlement agreement with the government. Here, the language of the settlement agreement did not support a finding of fraud because there was specific language in the settlement agreement that disclaimed liability and reserved certain rights. Additionally, contractors should be aware that even if they incur substantial legal fees and believe they have reached a settlement agreement with the government, the government may still be permitted to raise a new affirmative defense in a motion for summary judgment.

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