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Cover Page Footnote

J.D. Candidate, December 2014, The Catholic University of America, Columbus School of Law. The author gives thanks to Lori Lange and Donald Tobin, his friends and colleagues at Peckar & Abramson, P.C., for their invaluable insight and guidance in support of this Note. The author also expresses thanks to the Catholic University Law Review for bringing this Note to publication form. Finally, the author dedicates this Note in loving memory of his Grandfather, Joseph R. McCormick, who personified excellence.

DRAWING THE LINE: BOARD OF CONTRACT APPEALS' JURISDICTION TO MAKE DETERMINATIONS OF FRAUD

Benjamin Williams⁺

Jurisdiction is a powerful concept in American jurisprudence.¹ When codified by statute, jurisdiction authorizes courts and administrative tribunals to hear cases or controversies within the defined area of law.² The Contract Disputes Act of 1978 (CDA) provides the Boards of Contract Appeals (BCA) with the statutory authority and specifies the procedures to resolve disputes between federal government contractors and federal contracting agencies.³ Although CDA jurisdiction extends to a broad range of contractual disputes, some matters relating to government contracts fall outside of the CDA's scope.⁴

Generally, the scope of the CDA is limited to matters arising under, or relating to, a contract between the federal government and a government contractor.⁵ Thus, whether certain claims are sufficiently related to a government contract is a fundamental question underlying all controversies between the government and a contractor.⁶ However, it is not always clear whether those claims are subject to the CDA.

The language of the CDA appears to preclude the Boards from making determinations of fraud.⁷ The federal courts and the Boards have held that the provisions of the CDA preclude the Boards from deciding whether a contractor

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1. See, e.g., *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976) (“No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal court jurisdiction to actual cases or controversies.”).

2. See, e.g., 41 U.S.C. § 7105(e)(1)(A)–(D) (Supp. V 2012) (allocating jurisdiction of appeals to various agency boards of contract appeals including the Armed Services Board and the Postal Service Board).

3. See 41 U.S.C. §§ 7101–7109 (Supp. V 2012).

4. See, e.g., *id.* § 7103(a)(5) (limiting the Contracts Disputes Act of 1978 by stating that “the authority of this subsection . . . does not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation that another federal agency is specifically authorized to administer, settle, or determine”).

5. JOHN CIBINIC, JR., *ADMINISTRATION OF GOVERNMENT CONTRACTS* 1236 (4th ed. 2006).

6. *Id.* at 1240–57 (addressing the criteria for determining whether a claim is one relating to the contract and thus subject to the dispute process).

7. 41 U.S.C. § 7103(a)(5), (c)(1) (explaining that “[t]his section does not authorize an agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud”).

committed fraud.⁸ However, there are a series of cases from the Armed Services Board of Contract Appeals (ASBCA) in which the Board made determinations of fraud, resulting in a split of authority.⁹

This Note addresses the issue of whether the Boards have jurisdiction under the CDA to make fraud determinations. First, this Note discusses the legislative history of the CDA and sets forth a chronological analysis of decisions both before and after the CDA's enactment, from the federal courts and agency boards. This Note then examines the split of authority between the ASBCA and other agency boards concerning the Boards' jurisdiction to make fraud determinations. Critical to this analysis is the procedural context in which the issue of fraud arises. Finally, this Note argues that the decisions of the ASBCA cannot be reconciled with decisions from federal courts and other agency boards that hold that agency boards do not have jurisdiction to make fraud determinations. This Note concludes that the issue is ripe for appeal to clarify the unsettled law.

I. CONTRACT DISPUTES ACT JURISDICTION OVER FRAUD

The CDA provides the statutory basis and guidelines for dispute resolution between contractors¹⁰ and the federal government.¹¹ A contractor first submits its claim to the applicable agency's contracting officer (CO).¹² The CO then issues a final decision as to the claim.¹³ Contractors then have the right to either appeal from the CO's final decision¹⁴ to an agency Board,¹⁵ or file a claim in the

8. See *infra* Part I.C.

9. See *infra* Part II.

10. 41 U.S.C. § 7101(7) (defining a "contractor" as "a party to a Federal Government contract other than the Federal Government").

11. 41 U.S.C. §§ 7101–7109. Prior to 2011, the CDA could be found at 41 U.S.C. §§ 601–613 (2006). The 2011 revisions made only stylistic changes. Compare *id.* §§ 7101–7109, with *id.* §§ 601–603. Unless otherwise cited in a decision prior to 2011, all references to the CDA will cite to 41 U.S.C. §§ 7101–7109.

12. *Id.* § 7103(a). The term "contracting officer" (CO) "means an individual who, by appointment in accordance with applicable regulations, has the authority to make and administer contracts and to make determinations and findings with respect to contracts; and . . . includes an authorized representative of the contracting officer, acting within the limits of the representative's authority." *Id.* § 7101(6)(A)-(B).

13. *Id.* § 7103(d). Additionally, the CO's decision is final unless a party files a timely appeal. *Id.* § 7103(g).

14. *Id.* § 7104(a).

15. *Id.* § 7104(a). Prior to the establishment of the Civilian Board of Contract Appeals (CBCA) in 2007, there were several agency boards. The Board, THE U.S. CIVILIAN BD. OF CONTRACT APPEALS, <http://www.cbca.gsa.gov/board/index.html> (last updated Dec. 17, 2013). The CBCA consolidated eight different agency boards for contract appeals. *Id.* However, all decisions of former Boards are still binding. *Id.* CBCA decisions apply to all federal agencies "except the Department of Defense and its constituent agencies, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Rate Commission, and the

United States Court of Federal Claims (COFC).¹⁶ In either case, a contractor may appeal the decision to the United States Court of Appeals for the Federal Circuit.¹⁷

Prior to the CDA's enactment, contractors were required to bring their claims against the United States under a variety of statutory and contractual provisions.¹⁸ This process resulted in considerable uncertainty as to what matters could be litigated and what authority was given to the heads of agencies and the tribunals tasked with hearing those disputes.¹⁹ In an effort to limit uncertainty, the CDA codified and broadened the scope and authority of the fora responsible for the dispute resolution process.²⁰

Although the CDA preserved the requirement that a contractor must first exhaust its administrative remedies with the applicable agency, the CDA provides contractors with the right to appeal from an agency CO's final decision to either an agency Board or the COFC.²¹ In either case, the dispute is subject to the procedures set forth in the CDA.²² The expanded coverage and litigation options under the CDA afford contractors significant protection in pursuing their claims against the federal government.²³

In addition to proscribing the rights of contractors and the procedures for litigating contractors' claims, the CDA identifies the types of claims that are subject to the Act.²⁴ Indeed, the critical language underlying the scope of the Act's dispute process is the phrase *relating to the contract*.²⁵ Although this

Tennessee Valley Authority." *Id.*; see 41 U.S.C. §§ 7105(a) – (e) (Supp. V 2012), for a list of the remaining boards and a description of their authority under the CDA.

16. 41 U.S.C. § 7104(b); *United States v. Kasler Elec. Co.*, 123 F.3d 341, 346 (6th Cir. 1997) (stating that the CDA is responsible for keeping government contract claims in the appropriate forum, which helps regulate the waiver of sovereign immunity and provide tribunals with adequate knowledge and experience); see also A. Jeff Ifrah, Board Procedures Involving Fraud Counterclaims Against Contractors, Briefing Papers No. 07-10 (September 2007) (discussing the potential outcomes of adjudicating a contractor's claim involving fraud before the different fora).

17. 41 U.S.C. § 7107(a)(1) (Supp. V 2012); 28 U.S.C. § 1295 (a)(3), (10) (Supp. V 2012).

18. See CIBINIC, *supra* note 5, at 1231 (explaining that before the CDA was passed, contractors could bring claims against the government under the Tucker Act for alleged violations of the Constitution, congressional acts, or government regulations).

19. *Id.* (noting that with the increase of government procurement during the twentieth century, it became difficult for contractors to take advantage of sovereign immunity waivers because many contracts with the government contained dispute provisions limiting such waivers).

20. *Id.* at 1239–40.

21. 41 U.S.C. § 7104(a)-(b). The CDA provides that the applicable agency board is granted authority to hear appeals from a CO's decision. See *id.* § 7105(e)(1)(A)–(D).

22. CIBINIC, *supra* note 5, at 1231.

23. *Id.* at 1244 (explaining that the CDA broadened coverage to include court and board jurisdiction over all disputes "relating to the contract," as opposed to only those disputes in which the contract contained a "remedy granting" clause that encompassed the contractor's desired remedy).

24. *Id.* § 7102(a)-(d) (Supp. V 2012).

25. CIBINIC, *supra* note 5, at 1232, 1236–37. (addressing the criteria for determining whether a claim is one relating to the contract and thus subject to the dispute process).

language appears to provide broad coverage for contractual disputes between contractors and the government, it does not include all types of controversies.

The CDA contains two provisions that appear to exempt matters of fraud from the dispute process.²⁶ A reading of these two provisions and the legislative history of the CDA suggest that a federal agency cannot present statutory claims or disputes—including statutory fraud-based claims or disputes—that another agency is specifically authorized to address.²⁷ Moreover, a federal agency cannot adjudicate a claim involving fraud before its administrative board.²⁸ Despite this interpretation, there are still Board decisions that entertain federal agencies' allegations of either statutory fraud-based claims or the existence of fraud in connection with the contract.²⁹ In some of these decisions, the Boards have made factual findings that contractors have committed fraud, and voided the contracts as a result.³⁰ Through this disparate treatment of government assertions of contractor fraud, the Boards have left in their wake a minefield of legal analysis in need of careful navigation.³¹

26. 41 U.S.C. §§ 7103(a)(5) (stating that “[t]he authority of this subsection . . . does not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine.”); *Id.* § 7103(c)(1) (providing that “[t]his section does not authorize an agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud”).

27. *See infra* Part I.B.

28. *See* 41 U.S.C. § 7103 (c)(1).

29. *See infra* Part II.

30. *See, e.g.*, *Servicios y Obras Isetan S.L.*, ASBCA No. 57584, 13-1 BCA ¶ 35,279, at 173,160–61; *ORC, Inc.*, ASBCA No. 49693, 96-2 BCA ¶ 28,371, at 141,681; *C & D Constr., Inc.*, ASBCA No. 38661, 90-3 BCA ¶ 23,256, at 116,683–84. The finding of fraud in connection with a contract is devastating to a contractor's CDA claim because it renders the board without jurisdiction to decide the underlying issue of the contractor's claim. *See* *Andreas Boehm Malergrossbetrieb*, ASBCA No. 44017, 01-1 BCA ¶ 31,354, 154,539–40 (representing a situation in which the government moved for dismissal of the contractor's claim based on lack of jurisdiction contending that the subject contract was tainted by bribery in the inducement and therefore void *ab initio*). The implication of rendering a contract void for fraud is that no contract exists from which the contractor may assert a claim for consideration before the Board; therefore, the Board has no jurisdiction to decide the issue. *See* *Joule Technical Corp.*, NASA BCA No. 978-27, 79-2 BCA ¶ 14,017, at 68,841–43 (citing *City Window Cleaners*, IBCA No. 1218–10–78, 79–2 BCA ¶ 13,901) (holding that the Board “must always consider the issue of its jurisdiction, and where [the Board finds] that a contract is void *ab initio* [it] may go no further in resolving disputes arising thereunder”).

31. *Compare* *AAA Eng'g & Drafting, Inc.*, ASBCA Nos. 47940, et al., 01-1 BCA ¶ 31,256, at 154,366–67 (finding a contract void for fraud based upon a prior conviction from a court of competent jurisdiction), *with* *Schuepferling GmbH & Co., KG*, ASBCA No. 45564, et al., 98-1 BCA ¶ 29,659, at 146,953–54 (rendering a contract void *ab initio* based upon the Board's own finding of fraud).

A. *The CDA Provisions Excepting Fraud from Board Jurisdiction as Analyzed in Martin J. Simko Construction, Inc.*

The legislative history of the CDA appears to demonstrate that Congress did not intend the CDA to reach matters of fraud.³² The leading analysis of both the legislative history and the CDA fraud provisions emerged from the decision by the United States Court of Appeals for the Federal Circuit (CAFC) in *Martin J. Simko Constr., Inc. v. United States*.³³ That case involved a controversy over a contract between the United States Air Force and Martin J. Simko Construction, Inc. (“Simko”) concerning the construction of a jet fuel loading facility.³⁴ Simko filed suit after the Air Force terminated its contract for default.³⁵ The government asserted counterclaims alleging fraud under the False Claims Act (FCA), and the anti-fraud provisions of the CDA.³⁶ To decide whether jurisdiction under the CDA allowed an agency Board to decide whether the contractor violated the FCA, the court provided an extensive analysis of the CDA’s legislative history.³⁷

The court first reviewed the relevant language of the CDA, now Sections 7103(a)(5) and (c)(1).³⁸ These sections state that CDA jurisdiction “does 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”³⁹ and that no agency head is authorized “to settle, compromise, pay, or otherwise adjust any claim involving fraud.”⁴⁰ The court then analyzed the legislative history of the CDA and concluded that Congress did not intend to include fraud claims within agency BCA jurisdiction as set forth in Section 7103.⁴¹

32. See *Martin J. Simko Constr., Inc. v. United States*, 852 F.2d 540, 542–47 (Fed. Cir. 1988).

33. See *id.*

34. *Id.* at 541.

35. *Id.*

36. *Id.*

37. *Id.* at 542–47.

38. *Id.* at 542–43 (formerly part of 41 U.S.C. § 605(a) (2006)).

39. 41 U.S.C. § 7103(a)(5) (Supp. V 2012) (formerly part of 41 U.S.C. § 605(a)).

40. *Id.* § 7103(c)(1) (formerly part of 41 U.S.C. § 605(a)). The court gave concurrent treatment to Section 7103(c)(2), which is formerly Section 604, the so-called “anti-fraud” provision. See *Martin J. Simko Constr., Inc.*, 852 F.2d at 542; see also 41 U.S.C. § 7103(c)(2).

41. *Martin J. Simko Constr., Inc.*, 852 F.2d at 545 (stating that as indicated by legislative history, Section 7103 was never meant to address fraud claims); accord *Veridyne Corp. v. United States*, 86 Fed. Cl. 668, 677 (Fed. Cl. 2009). In *Veridyne*, the court summarized the issue addressed by the CAFC in *Simko* as whether, to properly invoke the jurisdiction of the U.S. Claims Court (now known as the Court of Federal Claims), the CDA required that the government’s CDA and FCA fraud counterclaims, first had to be the subject of a contracting officer’s decision. *Id.* (citing *Martin J. Simko Constr., Inc.*, 852 F.2d at 541–42). The CAFC reversed the trial court’s ruling, holding that a claim of fraud “was not a contract dispute” within the meaning of the CDA, but “rather a right enforceable by the [Justice Department] and redressable in a court of competent jurisdiction.” *Id.* at 544 (citing *Martin J. Simko Constr., Inc.*, 852 F.2d at 544). Other courts also have held that the FCA falls within the exception language of the CDA’s fraud provision. See, e.g.,

The court explained that during the congressional hearings, several executive agencies, including the Justice Department and the General Accounting Office,⁴² were concerned that the bill did not clearly state that agencies did not have jurisdiction to address controversies arising from fraudulent submissions against the United States.⁴³ The court addressed similar concerns from the Senate.⁴⁴ Based upon its analysis of the legislative history, the court reasoned that CDA jurisdiction did not extend to the FCA or other fraud-based claims referenced in Section 7103 because Congress had given the Department of Justice the responsibility to administer and enforce those statutes.⁴⁵ This analysis is consistent with numerous decisions from the federal courts and the Boards, both before and after the *Simko* decision.⁴⁶

B. CDA Jurisdiction to Decide Matters of Fraud Specifically Granted to Another Agency Under Section 7103(a)(5)

Numerous Board decisions (consistent with CDA Section 7103(a)(5)) have held that the Boards do not have jurisdiction over violations of fraud-based statutes or allegations of fraud relating to a contract claim.⁴⁷ In instances in which another agency holds enforcement responsibility, the Boards have

Sterling Millwrights, Inc. v. United States, 26 Cl. Ct. 49, 93 (1992) (observing that because “the False Claims Act is a statute which the Attorney General, through the qui tam provisions of 31 U.S.C. § 3730, is specifically authorized to administer,” it is not within the jurisdiction granted by the CDA).

42. The agency is presently called the Government Accountability Office (GAO). Our Name, U.S. Gov’t Accountability Office, <http://gao.gov/about/namechange.html> (last visited Apr. 12, 2014).

43. *Martin J. Simko Constr., Inc.*, 852 F.2d at 543 (citing Contract Disputes Act of 1978: Joint Hearings on S. 22292, S. 2787, and S. 2178 Before the Subcomm. on Federal Spending Practices and Open Government of the Committee on Governmental Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the Committee on the Judiciary, 95th Cong. 210–13 (1978)).

44. *Id.* at 544 (citing S. REP. NO. 95-1118, at 5 (1978), reprinted in 1978 U.S.C.C.A.N. 5235, 5239. Senator Chiles, a sponsor of the Act, declared that Congress did not intend for fraud claims to be determined by the Boards. *Id.*

45. *Id.* at 548 (finding that the language in the CDA denied jurisdictional authority over claims directly mandated to a specific federal agency). Additionally, explanations to CDA amendments noted the position that such amendments were created to clarify disputes involving breach of contract issues and they were not made to convey boards with jurisdictional authority over fraud-based claims. *Id.* at 544 (citing 124 CONG. REC. 35,267 (1978)).

46. See *infra* note 59 and accompanying text.

47. See, e.g., *Turner Constr. Co.*, GSBICA No. 16840, 06-2 BCA ¶ 33,391, at 165,547; *Turner Constr. Co.*, GSBICA Nos. 15502, et al., 05-2 BCA ¶ 33,118, at 164,120; *Range Tech. Corp.*, ASBCA No. 51943, 03-2 BCA ¶ 32,290, at 159,773; *AAA Eng’g & Drafting, Inc.*, ASBCA Nos. 47940, et al., 01-1 BCA ¶ 31,256, at 154,366; *United Tech. Corp.*, ASBCA Nos. 46880, et al., 95-2 BCA ¶ 27,698, at 133,079; *Cessna Aircraft Co.*, ASBCA No. 43196, 93-1 BCA ¶ 25,511, at 127,052; *Fleischzentrale Sudwest GmbH*, ASBCA No. 37273, 89-3 BCA ¶ 21,956, at 110,444; *Greenleaf Distrib. Serv., Inc.*, ASBCA No. 34300, 88-3 BCA ¶ 21,001, at 106,100; *General Constr. and Dev. Co.*, ASBCA No. 36138, 88-3 BCA ¶ 20,874, at 105,551; *M & M Serv., Inc.*, ASBCA No. 28712, 84-2 BCA ¶ 17,405, at 86,688.

interpreted Section 7103(a)(5) to exclude violations of fraud-based statutes from the CDA's jurisdiction.⁴⁸ However, when an agency seeks to void a contract as a matter of public policy based upon the taint of fraudulent behavior, Boards are less clear in applying the CDA's jurisdictional limitation.

C. Board Authority to Address Matters of Fraud Under Section 7103(c)(1).

In the thirty-five years since the CDA's enactment, decisions by the COFC, CAFC, the federal district courts, and the Boards interpreting the CDA's fraud exception have uniformly held that a Board *may* rely upon findings of fraud made by courts of competent jurisdiction in determining that a contract is void or void *ab initio* for fraud.⁴⁹ However, both the language of the statute and the decisions interpreting Board jurisdiction make it less obvious that a Board *may not* rely on its own findings of fraud in determining if a contract is void or void *ab initio* for fraud, which has led to a split of authority among the Boards.⁵⁰

Beginning in 1990, the ASBCA issued a string of decisions in which it made its own determinations of fraud without explaining the jurisdictional bases for its actions.⁵¹ Because of the confusion resulting from these decisions, it is necessary to address the relevant federal court holdings; discuss the relevant BCA decisions chronologically since the CDA was enacted; and analyze those decisions in which the Board made its own findings of fraud.

1. Federal Circuit and Federal District Court Holdings

CDA Section 7103(c)(1) specifically states that the CDA “does not authorize an agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.”⁵² The CAFC has interpreted this provision broadly to exclude claims involving fraud from agency jurisdiction.⁵³ Federal district courts have reached similar conclusions, determining that the CDA provisions exclude from the Boards' jurisdiction not just fraud allegations, but more generally, claims concerning fraud.⁵⁴

48. *See, e.g.,* Turner Constr. Co., 05-2 BCA ¶ 33,118 at 164,122 (holding that the Anti-Kickback Act and the Sherman Act fall outside the jurisdiction granted by the CDA because they are specifically enforced by other federal agencies).

49. *See infra* Part I.C.1-2.

50. *See infra* notes 113–14 and accompanying text (explaining that no board has ever affirmatively stated that it has the jurisdiction to make determinations of fraud).

51. *See infra* Part II.

52. 41 U.S.C. § 7103(c)(1) (Supp. V 2012).

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

54. *See* United States v. Kellogg Brown & Root Serv., Inc., 800 F. Supp. 2d 143, 160 (D.D.C. 2011) (quoting 41 U.S.C. § 605(a) [now Section 7103]) (stating that the CDA clearly prohibits jurisdiction over fraud-related claims); *accord* First Choice Armor & Equipment, Inc. v. United States, 808 F. Supp. 2d. 68, 80 (D.D.C 2011); United States v. Marovic, 69 F. Supp. 2d 1190, 1193 (N.D. Cal. 1999); United States v. Unified Indus., Inc., 929 F. Supp. 947, 950–51 (E.D. Va. 1996) (holding that the CDA exception applies to claims “involving fraud” and not merely to claims “of fraud” or “for fraud” and that the CDA's language suggests an intention to restrict CDA jurisdiction

2. *BCA Holdings since the CDA's Enactment*

Similar to the federal courts, Boards have held that CDA jurisdiction does not extend to either claims of fraud or claims involving fraud.⁵⁵ This position has remained consistent since the CDA's enactment.⁵⁶

a. *Boards of Contract Appeals: 1980 to 1989*

Perhaps the earliest decision to address the Boards' CDA jurisdiction to determine whether fraud exists came from the Department of Transportation Contract Appeals Board (DOT CAB) in *Fidelity Constr. Co.* in 1980.⁵⁷ In that case, the DOT CAB specifically held that it lacked jurisdiction to make findings of fraud.⁵⁸ The DOT CAB went on to clarify, that this limitation existed both before and after the CDA's enactment.⁵⁹ Earlier decisions from the other Boards have reached similar conclusions.⁶⁰

For example, in *M & M Serv., Inc.*, the ASBCA adopted the position of DOT CAB in *Fidelity*.⁶¹ The *M & M* decision concerned a contracting officer's denial of payment for maintenance services on an Air Force base because government officials believed the contractor submitted fraudulent data to support its unpaid invoices.⁶² The government argued that the Board could not rule on the claim because it would have to determine whether the contractor committed fraud, and the Board did not have this authority under the CDA.⁶³ Although the Board held that it could determine whether the government was breaching the contract by failing to pay the contractor for its alleged services rendered, it refused to address

to exclude not only fraud-based claims but also fraud-related claims); *United States v. Rockwell Int'l Corp.*, 795 F. Supp. 1131, 1135 (N.D. Ga. 1992) (holding that the CDA restricts jurisdictional authority to prevent Boards from resolving fraud claims and fraud-related claims); *United States v. JT Constr. Co.*, 668 F. Supp. 592, 594 (W.D. Tex. 1987) (stating that the CDA's legislative history clearly shows an intent to exclude fraud claims from Board jurisdiction).

55. *See infra* Part I.C.2.a-d.

56. *See infra* Part I.C.2.a-d.

57. *See Fidelity Constr. Co.*, DOT CAB Nos. 1113, 1123, 80-2 BCA ¶ 14,819, at 73,141. As of 2007, the Department of Transportation's board is consolidated under the CBCA. *See supra* note 15.

58. *Fidelity Constr. Co.* DOT CAB, 80-2 BCA ¶ 14,819 at 73,140.

59. *Id.*; S. REP. NO. 95-1118, at 19 (1978), reprinted in 1978 U.S.C.C.A.N. 5235, 5253) (stating that although the Board has authority to settle contractor's disputes relating to government contracts, the Board does not have the authority to decide fraud claims).

60. *See, e.g.*, *Highland Reforestation, Inc.*, IBCA No. 1563-3-82, 83-2 BCA ¶ 16,650 at 82,789 (finding that Boards do not have jurisdiction to determine whether a contractor has violated a criminal statute); *Comada Corp.*, ASBCA Nos. 26599, et al., 83-2 BCA ¶ 16,681 at 83,012 (holding that the court did not have authority to make fraud determinations); *Warren Beaves d.b.a. Commercial Marine Serv.*, DOT CAB No. 1324, 83-1 BCA ¶ 16,232, at 80,648 (holding that the legislative history of the CDA clearly expresses the Board's lack of jurisdiction over any type of fraud claim).

61. *M&M Serv. Inc.*, ASBCA No. 28712, 84-2 BCA ¶ 17,405, at 86,688.

62. *Id.* at 86,687.

63. *Id.*

the issue of whether the contractor committed fraud for which the government would have a claim or defense under the CDA or any other relevant statute.⁶⁴ The Board clarified its position, recognizing that “the issue of the rights of the parties under the contract and the determination of whether fraud exists are two separate matters to be decided by different tribunals.”⁶⁵

Similarly, in *General Constr. and Development Co., Inc.*, the ASBCA relied upon *M & M Services* in refusing to make a finding of fraud regarding government allegations of false invoices submitted for roofing supplies.⁶⁶ The Board observed that the government could delay the action pending in the Board to first seek a ruling on the fraud issue from the appropriate tribunal.⁶⁷ Other decisions from the ASBCA during this period held that the CDA provisions did not give the Board jurisdiction over matters of fraud,⁶⁸ but noted that allegations of fraud do not divest the Board of its authority to address the underlying contract dispute.⁶⁹

b. Boards of Contract Appeals: 1990 to 1999

Board decisions between 1990 and 1999 continued to recognize that the Boards do not have jurisdiction to determine fraud, but rather, must rely upon determinations made by courts of competent jurisdiction. For example, in *Hardrives, Inc.*, the Department of Interior’s Board of Contract Appeals (IBCA) held that it had jurisdiction to decide a contractor’s contract claims, but lacked jurisdiction to make a fraud determination.⁷⁰ Similarly, the Engineering Board of Contract Appeals (ENG BCA) in *Beech Gap, Inc.* observed that, although the Board itself does not determine fraud, it may rely upon fraud determinations

64. *Id.* at 86,688.

65. *Id.* (quoting *Fidelity Constr. Co.*, DOT CAB Nos. 1113, 1123, 80-2 BCA ¶ 14,819, at 73,142 (holding that a contractor’s claim will not be automatically dismissed merely on the bases of government allegations of fraud)).

66. *Gen. Constr. & Dev. Co.*, ASBCA No. 36138, 88-3 BCA ¶ 20,874, at 105,552 (stating that the Board will not determine whether the contractor submitted false invoices “for which the Government may have a right to civil or criminal penalties”).

67. *Id.* Other Boards have held similarly. *See Danac, Inc.*, ASBCA No. 30227, 33394, 88-3 BCA ¶ 20,993 at 106,172 (holding that the Board will not determine fraud-based claims).

68. *See Greenleaf Distrib. Serv., Inc.*, ASBCA No. 34300, 88-3 BCA ¶ 21,001, at 106,100 (agreeing that the Board does not have the authority to determine fraud); *see also Toombs & Co.*, ASBCA Nos. 35085, 35086, 89-3 BCA ¶ 21,993 at 110,598 (stating that the Board cannot impose the civil or criminal penalties for a fraud).

69. *See Fleischzentrale Sudwest GmbH*, ASBCA No. 37273, 89-3 BCA ¶ 21,956, at 110,444 (holding that fraudulent claims do not preclude the Board from ruling on the contract issues); *Todd Shipyards Corp.*, ASBCA No. 31092, 88-1 BCA ¶ 20,509 at 103,682 (mirroring the holding that the court always has jurisdiction to rule on the underlying contract dispute).

70. *Hardrives, Inc.*, IBCA Nos. 2319, et al., 91-2 BCA ¶ 23,769, at 119,062. As of 2007, the IBCA is consolidated under the CBCA. *See supra* note 15.

made by forums with the appropriate jurisdictional authority.⁷¹ In *Donat Gerg Haustechnik*, the ASBCA noted that a finding of fraud by another tribunal was a prerequisite for a finding that a contract was void *ab initio* when it stated, “[i]f the Government is able to establish, in the court suits, that this contract was fraudulently obtained as the result of bid-rigging and collusion between [the contractors] or with the improper assistance of a U.S. Government employee, . . . the contract could be declared null and void *ab initio*.”⁷² The ASBCA concluded that a proper showing of fraud would strip it of jurisdiction to hear the appeal.⁷³

In *Nexus Constr. Co.*, the ASBCA succinctly articulated that a finding of fraud from a court of competent jurisdiction is a precondition to the dismissal of an appeal from a contractor’s claim.⁷⁴ In that case, a contractor appealed from the Army’s decision to terminate the contractor for default on a construction project.⁷⁵ After a hearing on the merits, the Board converted the default termination to a termination for convenience.⁷⁶ Thereafter, the contractor submitted a termination for convenience claim.⁷⁷ The Army alleged that the contractor’s claim contained false charges and referred the claim to its Procurement Fraud Division, recommending debarment of the contractor.⁷⁸

71. Beech Gap, Inc., ENG BCA Nos. 5585, 5600, 95-2 BCA ¶ 27,879, at 139,076, *aff’d*, 86 F.3d 1177 (Fed. Cir. 1996). As of 2007, the Eng BCA is consolidated under the CBCA. *See supra* note 15.

72. Donat Gerg Haustechnik, ASBCA Nos. 41197, et al., 96-1 BCA ¶ 27,977 at 139,734–35 (citing *Godley v. United States*, 5 F.3d 1473, 1475 (Fed. Cir. 1993)) (holding that a contract that is fraudulent is void *ab initio*).

73. *Id.* at 139,734. Generally, where a contract is considered void *ab initio* for fraud in the inception, or void for fraud in the performance, the Boards will dismiss the case for lack of jurisdiction because the voiding of the contract means there is no contract and therefore no claim from which an appeal can be taken. *See Schuepferling GmbH & Co., KG*, ASBCA No. 45564, 98-1 BCA ¶ 29,659, at 146,953–54 (upholding the government’s motion to dismiss because the Board lacked jurisdiction to decide the merits of the contractor’s claim because the contract was void *ab initio* as result of the contractor’s fraud); *see also Erwin Pfister General – Bauunternehmen*, ASBCA Nos. 43980, et al., 01-2 BCA ¶ 31,431, at 155,226; *Anreas Boehm Malergrossbetrieb*, ASBCA No. 44017, 01-1 BCA ¶ 31,354, at 154,839–40; *Schneider Haustechnik GmbH*, ASBCA No. 43969, 45568, 01-1 BCA ¶ 31,264, at 154,440; *Schuepferling GmbH & Co., KG*, ASBCA No. 45567, 98-2 BCA ¶ 29,828, at 147,679; *Schuepferling GmbH & Co., KG*, ASBCA No. 45565, 98-2 BCA ¶ 29,739, at 147,405.

74. *Nexus Constr. Co.*, ASBCA No. 51004, 98-1 BCA ¶ 29,375, at 146,017.

75. *Id.* at 146,016.

76. *Id.* at 146,017. For a contractor, the significant difference between a termination for default and one for convenience (in the government’s interest) is that when the contracting officer terminates a contract for convenience, the government is liable to the contractor for the contractor’s incurred costs and profit on all work performed. *See, e.g.*, 48 C.F.R. § 52.249-2 (2012).

77. *Nexus Constr. Co.*, 98-1 BCA ¶ 29,375 at 146,016.

78. *Id.* at 146,016–17; *see* 48 C.F.R. § 52.249-2(e) (describing the procedures for submitting a termination claim for a fixed-price contract). The ramifications of even the proposal for debarment means a contractor is excluded from receiving additional government contracts, and absent a compelling interest, agencies do not conduct business with debarred contractors. 48 C.F.R. § 9.405(a) (2012).

Although the Debarment Official determined that the contractor should be debarred, the determination did not include findings of “fraudulent” or “knowingly false” statements.⁷⁹ The Board denied the government’s motion to deny the contractor’s termination claim for lack of jurisdiction, holding that it had CDA jurisdiction because the Debarment Official’s decision failed to find contractor fraud and the Debarment Official was not a court of competent jurisdiction.⁸⁰

c. Boards of Contract Appeals: 2000 to 2009

From 2000 to 2009, the Boards continued to recognize that allegations of fraud did not divest them of their jurisdiction to address the underlying CDA disputes.⁸¹ In addition, several decisions addressed the more subtle issue of whether Boards have jurisdiction over fraud allegations that surface in the form of an affirmative defense.⁸² Although not always clear, these decisions support the conclusion that a Board does not have jurisdiction to determine an affirmative defense of fraud when doing so requires a Board’s finding of fraud.⁸³

The General Services Board of Contract Appeals’s (GSBCA)⁸⁴ decision in *Turner Constr. Co.* illustrates this subtle distinction.⁸⁵ *Turner* involved a subcontractor’s claim for additional costs resulting from design defects in the construction of a U.S. courthouse.⁸⁶ During trial, the government asserted affirmative defenses alleging various statutory violations of the FCA, the Anti-Kickback Act, and the Sherman Act, and argued that the violations

79. *Nexus Constr. Co.*, 98-1 BCA ¶ 29,375 at 146,017.

80. *Id.*; *see also* *Cessna Aircraft Co.*, ASBCA No. 43196, 93-1 BCA ¶ 25,511 at 127,052 (holding that the Board did not have the authority to determine whether criminal statutes have been violated); *United Tech. Corp.*, ASBCA Nos. 46880, *et al.*, 95-2 BCA ¶ 27,698, at 138,079 (holding that the Board did not have jurisdiction over criminal fraud).

81. *See, e.g.*, *Medica, S.A.*, ENG BCA No. PCC-142, 00-2 BCA ¶ 30,966, at 152,812 (holding that the CDA’s limited fraud exception would not necessarily apply as the Government asserted, even if such payments may have been a result of illicit activity). The Board qualified that determining whether such fraud exists would be a separate matter to be resolved by a court of competent jurisdiction. *Id.*

82. *See, e.g.*, *Turner Constr. Co.*, GSBCA Nos. 15502, *et al.*, 05-2 BCA ¶ 33,11, at 164,117, 164,123 (denying an affirmative defense that would turn on a Board’s finding of fraudulent conduct); *Range Tech. Corp.*, ASBCA No. 51943, 03-2 BCA ¶ 32,290, at 159,773 (holding that the ASBCA lacked jurisdiction to decide an affirmative defense based upon an FCA violation); *Envtl. Sys., Inc.*, ASBCA No. 58283, 03-1 BCA ¶ 32,167, at 159,053, *aff’d*, ASBCA No. 53283, 03-1 BCA ¶ 32,242, at 159,428 (holding that, with respect to an affirmative defense alleging the elements of fraud, the Board does not have authority to determine FCA disputes).

83. The Environmental Systems Board applied the Simko analysis of 41 U.S.C. § 7103(a)(5) and government counterclaims in fraud to an affirmative defense of fraud in finding that the CDA precludes the ASBCA from exercising jurisdiction over these issues because the Department of Justice is the federal agency authorized to administer, settle, and determine FCPA violations. *Envtl. Sys., Inc.*, 03-01 BCA at 159,053.

84. The GSBCA is a predecessor to the CBCA. *See supra* note 15.

85. *See Turner Constr. Co.*, 05-2 BCA at 164,120.

86. *Id.* at 164,117.

rendered the contract unenforceable.⁸⁷ The Board denied the government's motion to amend its answer and concluded that the government's FCA allegation was "outside the jurisdiction of the CDA's disputes process."⁸⁸ With respect to the government's Anti-Kickback Act and Sherman Act allegations, the Board stated that violations of those Acts are enforced by other agencies⁸⁹ and therefore fall within Section 7103(a)(5)'s exception.⁹⁰ The Board emphasized that "an affirmative defense that would turn on a board's finding of fraudulent conduct . . . is not within [the Board's] jurisdiction."⁹¹

In *Giuliani Associates, Inc.*,⁹² the ASBCA further qualified the issue of jurisdiction over fraud related issues, explaining that a conviction for fraud in connection with one contract did not affect the underlying claim on a separate contract. In that case, the government moved to dismiss the appeal based on lack of jurisdiction or an affirmative defense of fraud because the contractor's president was convicted of falsifying progress payment invoices under another contract at the same location where the work was being performed.⁹³ The ASBCA denied the motion, stating neither the government nor the Board have discovered evidence of precedent that supports a dismissal based on "a fraud-tainted contract" aside from the actual contract at issue.⁹⁴ Accordingly, the Board denied the government's motion because it failed to show a conviction

87. *Id.* at 164,118, 164,121.

88. *Id.* at 164,122.

89. *Id.* at 164,123. The Board provided the bases for its ruling, explaining that criminal or civil liability for violations of the Anti-Kickback Act is determined in either a criminal or civil action brought by the Department of Justice, and that actions to enforce the Sherman Act are vested in the United States attorneys and the Department of Justice. *Id.* (citing the duties of U.S. attorneys under 15 U.S.C. § 4, and that of the Department of Justice under 28 U.S.C. § 516, respectively).

90. *Id.* at 164,122 (holding that an alleged Sherman Act violation comes within the purview of Section 7105(a)(5) that limits the Board's jurisdiction to adjudicate matters specifically designated to other federal agencies). The Board also stated that under the CDA Congress did not intend for Boards to have jurisdiction over any fraud-related claim. *Id.* (citing Warren Beaves, d/b/a Comm. Marine Svcs., DOT CAB No. 1324, 83-1 BCA ¶ 16,232, at 80,648).

91. *Id.* The GSBCA would again address the effect of Section 7103(a)(5) in a subsequent decision involving the same contract. *Turner Constr. Co.*, GSBCA No. 16840, 06-2 BCA ¶ 33,391, at 165,546. The decision involved an appeal from the CO's final decision to collect illegal kickbacks from the construction company. *Id.* Echoing much of the analysis in its prior decision, the GSBCA concluded that under the CDA, neither the contracting officer nor the Board may consider whether the contractor's conduct amounted to a kickback under the Anti-Kickback Act because a finding such as this is outside the contracting officer's and the Board's authority. *Id.* at 165,552. For a thorough analysis of the *Turner* decision and other Board decisions addressing fraud allegations, see A. Jeff Ifrah, Board Procedures Involving Fraud Counterclaims Against Contractors, Briefing Papers No. 07-10 (September 2007).

92. *Giuliani Associates, Inc.*, ASBCA Nos. 51672, 52538, 03-2 BCA ¶ 32,368, at 160,163-64.

93. *Id.* at 160,163.

94. *Id.*

of fraud or violation of a fraud-based statute in connection with the contested contract underlying the contractor's claim.⁹⁵

The ASBCA decision in *AAA Eng'g & Drafting, Inc.* denied a contractor's claim based upon an affirmative defense of fraud because a federal district court previously had issued judgment against the contractor for a violation of the FCA in connection with the contract.⁹⁶ The Board emphasized that its jurisdiction was premised upon the adjudication of fraud by a court of competent jurisdiction.⁹⁷ As a matter of public policy, the Board denied the contractor's claims, relying upon the district court's decision that the contractor violated the FCA.⁹⁸

d. Boards of Contract Appeals: 2010 to Present

In *ERKA Constr. Co.*, the ASBCA echoed the GSBCA's holding in *Turner* and its own holding in *AAA Eng'g & Drafting, Inc.*⁹⁹ In that case, the government's CO issued a final decision requiring ERKA to repay costs associated with allegations of fuel theft while the contractor was operating under a contract for a burn site in Iraq.¹⁰⁰ ERKA appealed from the CO's decision, asserting its right to offset and explaining that the fuel in question was used for other legitimate purposes.¹⁰¹ The government moved for summary judgment on an affirmative defense of fraud, requesting that the Board deny ERKA's appeal based upon conclusive evidence of fraud.¹⁰² The Board distinguished the cases cited by the government from those in which the Board made its determination based upon prior findings of fraud by courts of competent jurisdiction,¹⁰³ and denied the government's motion, stating that "there has been no court adjudication that ERKA has perpetuated a fraud."¹⁰⁴

95. *Id.* at 160,163–64. The government argued that the motion to dismiss should be granted because the contractor was convicted of making a false statement under a contract that was similar in terms of parties, location, and requirements. *Id.* at 160,163.

96. *AAA Eng'g & Drafting, Inc.*, ASBCA Nos. 47940, et al., 01-1 BCA ¶ 31,256 at 154,367–68.

97. *Id.* at 154,366 (citing *Joseph Morton Co., Inc. v. United States*, 757 F.2d 1273, 1281 (Fed. Cir. 1985)). The Board further stated that it had jurisdiction to hear an affirmative defense arising from an FCA violation as a result of the district court's ruling on the issue of FCA fraud. *Id.*

98. *Id.* at 154,367.

99. *ERKA Constr. Co., Ltd.*, ASBCA No. 57618, 12-2 BCA ¶ 35,129, at 172,475.

100. *Id.* at 172,469.

101. *Id.* at 172,475.

102. *Id.* at 172,469.

103. *Id.* at 172,475. The Board stated that the government cited cases that can be distinguished based on the fact that those cases, unlike the present case, contained previous court adjudications as to the issue of fraud. *Id.* (citing *AAA Eng'g & Drafting, Inc.*, 01-1 BCA, at 154,367–68; *Nat'l Roofing & Painting Corp.*, ASBCA No. 36551, et al., 90-2 BCA ¶ 22,936 at 115,131–34; *J.E.T.S., Inc.*, ASBCA No. 28642, 87-1 BCA ¶ 19,569, at 98,916–17, *aff'd*, 838 F.2d 1196 (Fed. Cir. 1988); *Techno Eng'g & Constr., Ltd.*, ASBCA No. 47471, 94-3 BCA ¶ 27,109 at 135,117.

104. *Id.* The ASBCA judge who authored the decision in *ERKA* authored three other decisions since 1999 addressing government affirmative defenses of fraud: *Nexus Construction*, *AAA*

More recently in 2013, the ASBCA found that it did not have jurisdiction to make factual findings on a violation of a criminal statute.¹⁰⁵ In *MOQA-AQYOL JV LTD*, the government filed a motion requesting that the Board disqualify the contractor's Vice President of Contracts from appearing on behalf of the contractor in the appeal because he had violated a criminal statute in connection with certifying the contract claim.¹⁰⁶ The Board concluded that it did not have jurisdiction to make factual findings or reach conclusions that the former vice president violated the criminal statute in question, and therefore could not exclude him from testifying.¹⁰⁷ The Board stated that it was not aware of authority allowing it to make determinations regarding the criminal matters at issue.¹⁰⁸ Although the Board's decision ignored the fraud provisions in 41 U.S.C. § 7103(a)(5), it recognized that the Board did not have jurisdiction to make findings or conclusions relating to matters that Congress delegated to the Department of Justice.¹⁰⁹

In April 2014, the ASBCA again addressed this issue in *Eyak Servs., LLC*.¹¹⁰ In that case, the government issued a final decision demanding the return of \$29.4 million dollars in overpayments.¹¹¹ The overpayments allegedly resulted from a fraudulent scheme orchestrated by employees of the government, the contractor, and a subcontractor.¹¹² The contractor moved to dismiss for lack of jurisdiction, asserting that the government's position was based upon allegations of fraud, which fell outside the Board's jurisdiction.¹¹³ The Board appeared to

Engineering, and Giuliani Assoc., Inc. All of the judge's decisions clearly recognize that the ASBCA only can determine a contract void or void *ab initio* when there has been an adjudication of fraud by a court of competent jurisdiction. *See supra* Part I.C.2.b-c.

105. *MOQA-AQYOL JV LTD*, ASBCA No. 57963, 13-1 BCA ¶ 35,285 at 175,169-70.

106. *Id.* The government alleged a Section 207 violation because the contractor's Vice President of Contracts was previously a government worker and worked substantially on both sides of the subject contract. *Id.* Section 207(a)(1) sets forth restrictions on former officers, employees, and elected officials of the executive and legislative branches. 18 U.S.C. § 207(a)(1) (2012). The statute further provides that any officer or employee of the executive branch of the United States, who after termination of employment "knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, or court . . . on behalf of any other person . . . in connection with a particular matter . . . in which the United States . . . is a party . . . in which the person participated personally and substantially . . . and which involved a specific party . . . shall be punished in accordance with section 216 of this title." *Id.*

107. *MOQA-AQYOL JV LTD*, 13-1 BCA ¶ 35,285 at 173,169-70 (holding that to disqualify the contractor's representative, the Board would have to find and conclude that he violated 18 U.S.C. § 207(a)).

108. *Id.*

109. *See id.* (noting that orders allowed under 18 U.S.C. § 216(c) are specifically assigned to the Attorney General of the United States).

110. ASBCA No. 58556, 2014 WL 1464072 (Apr. 1, 2014).

111. *Id.* at *2.

112. *Id.*

113. *Id.* at *1-2.

agree.¹¹⁴ However, the Board retained jurisdiction because the government asserted a contractual claim to recover the overpayments, which did not require the Board to determine whether the contractor had committed fraud.¹¹⁵

e. Summary: 1980 to 2013

Since Congress enacted the CDA, the agency Boards consistently have held that they lack jurisdiction to make factual determinations of fraud. *M & M Services*, *Greenleaf Distrib. Serv.*, and *ERKA*, cases spanning almost thirty years, demonstrate this point. However, there are ASBCA decisions as recent as 2013 in which the Board made independent findings of fraud without jurisdictional explanation.¹¹⁶

II. EXPANDING THE SCOPE: THE ASBCA DECISIONS THAT MADE INDEPENDENT FINDINGS OF FRAUD

The following ASBCA decisions illustrate instances in which the Board made its own independent fraud determination.¹¹⁷ In each of these decisions, the Board did not provide statutory support for its fraud determinations or determinations of violations of fraud-based statutes.¹¹⁸ More notably, the Board did not affirmatively state that it has jurisdiction.¹¹⁹ Instead, the Board assumed it had jurisdiction to make fraud determinations and proceeded to do so.¹²⁰ In so holding, the Board has departed from prior and contemporaneous Boards and federal court decisions.¹²¹

114. *Id.* at *4. In determining that the government's claim did not arise from any alleged fraud by the contractor, the Board acknowledged that the CDA's jurisdiction prevents government contracting officers from pursuing claims for penalties or for forfeitures arising from fraud as part of their final decisions, and that the Board "lacks jurisdiction over appeals involving such claims." *Id.* at *3 (citing *Martin J. Simko Constr., Inc. v. United States*, 852 F.2d 540 (Fed. Cir. 1988); and *Public Warehousing Co. K.S.C.*, ASBCA No. 58078, 13 BCA ¶ 35,460 at 173,896–97).

115. *Id.* at *4–5.

116. *See infra* Part II.D.

117. *See discussion infra* Part II.A–D.

118. *See, e.g.*, *Servicios y Obras Isetan S.L.*, ASBCA No. 57584, 13-1 BCA ¶ 35,279; *Erwin Pfister General-Bauunternehmen*, ASBCA Nos. 43980, et al., 01-2 BCA ¶ 31,431; *Andreas Boehm Malergrossbetrieb*, ASBCA No. 44017, 01-1 BCA ¶ 31,354; *Schneider Haustechnik GmbH*, ASBCA Nos. 43969, 45568, 01-1 BCA ¶ 31,264; *Schuepferling GmbH & Co., KG*, ASBCA No. 45564, 98-1 BCA ¶ 29,659; *ORC, Inc.*, ASBCA No. 49693, 96-2 BCA ¶ 28,371; *C & D Constr., Inc.*, ASBCA No. 38661, 90-3 BCA ¶ 23,256.

119. *Servicios y Obras Isetan S.L.*, 13-1 BCA; *Erwin Pfister*, 01-2 BCA; *Andreas Boehm Malergrossbetrieb*, 01-1 BCA; *Schneider Haustechnik GmbH*, 01-1 BCA; *Schuepferling GmbH & Co., KG*, 98-1 BCA ¶ 29,659; *ORC, Inc.*, 97-1 BCA; *C & D Constr., Inc.*, 90-3 BCA.

120. *See supra* note 113 and accompanying text.

121. *See supra* Part I.C.2.e.

A. The ASBCA's Departure in C & D Construction

C & D Construction, Inc. is the earliest example of a Board making its own findings of fraud since the enactment of the CDA.¹²² In that case, the contractor claimed expenses for extra work due to government delays performed on a relatively small contract to install HVAC equipment.¹²³ The government contended that the contract was void because the contractor allegedly misrepresented its small business status during the contract award process.¹²⁴ The ASBCA found that the contractor committed fraud by misrepresenting itself as a small business.¹²⁵ As a result, the Board held that the contract was void and the contractor could not recover on its claim.¹²⁶

The ASBCA relied upon its previous decisions in *Nat'l Roofing & Painting Corp.* and *J.E.T.S., Inc.* for the proposition that, when a contractor made misrepresentations during the government's bidding process, the resulting agreement is void or voidable.¹²⁷ However, in each of those decisions, the Board did not make its own determination of fraud.¹²⁸ Instead, the Board relied upon a criminal conviction made by a court of competent jurisdiction.¹²⁹ The *C & D* Board ignored this critical distinction, and proceeded to make its own fraud determination.

B. C & D Is Carried Forth

In *ORC, Inc.*,¹³⁰ the government asserted an affirmative defense alleging that the contractor misrepresented the academic credentials of personnel and falsely certified that the contractor had prepared 100 percent of the proposal.¹³¹ The government argued that this misrepresentation amounted to fraud in the inducement, rendering the contract void *ab initio*.¹³²

The Board found that the contractor deliberately made false representations to the government to obtain the contract and therefore the contract was void.¹³³ In support of its conclusion, the Board relied upon the *C & D* decision.¹³⁴ But as explained above, *C & D* improperly ignored the preconditions set forth in

122. *C & D Constr., Inc.*, ASBCA No. 38661, 90-3 BCA ¶ 23,256 at 116,680, 116,683.

123. *Id.* at 116,678.

124. *Id.*

125. *Id.*

126. *Id.* at 116,684.

127. *Id.* at 116,683 (citing *Nat'l Roofing & Painting Corp.*, ASBCA Nos. 36551, 37714, 90-2 BCA ¶ 22,936; *J.E.T.S., Inc.*, ASBCA No. 28642, 87-1 BCA ¶ 19,659, *aff'd*, 838 F.2d 1196 (Fed. Cir. 1988)).

128. *See supra* Part I.C.2.e.

129. *C & D Constr., Inc.*, 90-3 BCA ¶ 23,256 at 116,679, 116,684.

130. *ORC, Inc.*, ASBCA No. 49693, 96-2 BCA ¶ 28,371 at 141,680.

131. *Id.* at 143,487-88.

132. *Id.* at 143,491.

133. *Id.*

134. *Id.*

National Roofing and *J.E.T.S.*, in which the ASBCA found that the contracts were void, not based upon its own determinations of fraud, but based upon findings of fraud by courts of competent jurisdiction.¹³⁵

C. Shuepferling and Its Progeny

The Board made similar findings of fraud one year later in *Schuepferling*.¹³⁶ *Schuepferling* was part of a series of appeals arising out of a widespread bribery scandal at an Army Regional Contracting Office in Fürth, Germany.¹³⁷ The ASBCA found that German contractors working at the base committed fraud by bribing government officials to obtain contracts.¹³⁸ Based on these findings, the Board declared the contracts void *ab initio*, and dismissed the appeals.¹³⁹ However, in each case, the Board never explained how or why it had jurisdiction to make determinations of fraud.¹⁴⁰ Rather, the Board assumed that it had jurisdiction and proceeded on the merits.¹⁴¹

135. See *C & D Constr., Inc.*, ASBCA No. 38661, 90-3 BCA ¶ 23,256, 116,683–84.

136. *Schuepferling GmbH & Co., KG*, ASBCA No. 45564, 98-1 BCA ¶ 29,659, 146,953.

137. See *id.* at 146,949–50. The Fürth ASBCA appeals involved a pervasive practice in which German contractors paid bribes to an Army contracting specialist (a German national employed by the Army) for preferential treatment in the bidding process. See, e.g., *id.* In those appeals, the contracting specialist and the contractors admitted to the payment of bribes, and the contracting specialist was convicted of bribery by the appropriate German court. See, e.g., *id.* However, the contractors were not convicted. The other Fürth appeals include: *Erwin Pfister General – Bauunternehmen*, ASBCA Nos. 43981, et al., 01-2 BCA ¶ 31,431, at 155,221; *Schneider Haustechnik GmbH*, ASBCA Nos. 43969, 45568, 01-1 BCA ¶ 31,264, at 154,436; *Andreas Boehm Malergrossbetrieb*, ASBCA No. 44017, 01-1 BCA ¶ 31,354, at 154,835; *Schuepferling GmbH & Co., KG*, ASBCA No. 45567, 98-2 BCA ¶ 29,828, at 147,676; *Schuepferling GmbH & Co., KG*, ASBCA No. 45565, 98-2 BCA ¶ 29,739, 147,402–03.

138. See, e.g., *Erwin Pfister General – Bauunternehmen*, 01-2 BCA at 155,224–25; *Andreas Boehm Malergrossbetrieb*, 01-1 BCA at 154,839; *Schneider Haustechnik GmbH*, 01-1 BCA at 154,435–36; *Schuepferling GmbH & Co., KG*, 98-2 BCA at 147,675–76; *Schuepferling GmbH, KG*, ASBCA No. 45565, 98-1 BCA at 147,402-03; *Schuepferling GmbH & Co., KG*, 98-1 BCA at 146,948–50.

139. *Schuepferling GmbH & Co., KG*, 98-1 BCA at 146,953–54.

140. See *supra* note 131 and accompanying text.

141. Similar to the decision in *ORC*, the first *Schuepferling* decision relied upon its misinterpretation of two ASBCA decisions to support its conclusion that the contract was void *ab initio*: *C & D Constr.* and *National Roofing*. *Schuepferling GmbH & Co., KG*, ASBCA No. 45564, 98-1 BCA ¶ 29,659, at 146,953–54. However, as discussed above, these decisions do not support the proposition that the ASBCA had jurisdiction to adjudicate fraud. See *supra* notes 121–23. In *National Roofing*, the Board relied upon criminal convictions by a court of competent jurisdiction. *Nat'l Roofing & Painting Corp.*, ASBCA Nos. 36551, 37714, 90-2 BCA ¶ 22,936, at 115,131–34. In *C & D Constr.*, the Board ignored this fundamental distinction and strayed beyond its jurisdiction. *C & D Constr., Inc.*, ASBCA No. 38661, 90-3 BCA ¶ 23,256, 116,683.

D. 2013 ASBCA Decisions Find Fraud Again

In 2013, the ASBCA carried the *C & D* holding forward in *Servicios y Obras Isetan S.L.*¹⁴² In that case, the government argued that the appeal should be dismissed or denied because the contract was void *ab initio* due to the contractor knowingly submitting false credentials to obtain the contract and knowingly submitting a false bank letter of guarantee to begin performance.¹⁴³ Similar to the decisions in *C & D*, *ORC*, and *Schuepferling*, the Board assumed, without explanation, that it had jurisdiction to determine whether there was a misrepresentation that would render the contract void *ab initio*. The Board proceeded on that basis and declared the contract void.¹⁴⁴ To date, not one of these decisions has been appealed to the CAFC.¹⁴⁵

III. DRAWING THE LINE: BOARD OF CONTRACT APPEALS' CDA JURISDICTION TO ADDRESS MATTERS OF FRAUD

It is simply impossible to reconcile the string of ASBCA decisions making factual findings of fraud with the other decisions of the ASBCA, the decisions of other Boards, and decisions of the federal courts, spanning thirty-five years, and holding that the Board does not have such jurisdiction. A decision in which a Board renders a contract void based upon a finding of fraud by a court of

142. *Servicios y Obras Isetan S.L.*, ASBCA No. 57584, 13-1 BCA ¶ 35,279, 173,160–61.

143. *Id.*

144. *See id.* at 173,161 (misapplying *J.E.T.S., Inc.*, ASBCA No. 28642, 87-1 BCA ¶ 19,659, at 98,917, *aff'd*, 838 F.2d 1196 (Fed. Cir. 1988)).

145. In 1999, the CAFC expressed its skepticism over the ASBCA's determination regarding the existence of fraud. *See Northrop Worldwide Aircraft Serv., Inc.*, ASBCA Nos. 45216, 45877, 98-1 BCA ¶ 29,654, *rev'd*, 192 F.3d 962 (Fed. Cir. 1999). In that case, the CAFC permitted the government to challenge the ASBCA's CDA jurisdiction to make factual determinations of fraud, even though the parties had never challenged jurisdiction before the Board, and the issue was not addressed in the Board's decision. *See* 192 F.3d at 968–69. The CAFC reversed the ASBCA's decision on other grounds, but not before expressing its opinion about whether the Board had jurisdiction. *See id.* (“Whether [the contractor] may have asked its employees to engage in fraud is a separate matter that the Board should not have determined because of the doctrine of collateral estoppel, as explained below. Therefore, we need not decide whether the Board had jurisdiction to make factual determinations concerning [the contractor's] alleged fraudulent behavior leading to the discharge of [its employees].”). The IBCA made the same observation in *Riennes Construction Co.* IBCA Nos. 3572-96, et al., 98-2 BCA ¶ 29,821 at 147,658. In *Riennes*, the Bureau of Indian Affairs (BIA) argued that a contract for the construction of housing should be void *ab initio* based upon the contractor's submission of false insurance certificates. *Id.* at 147,652. The BIA cited the ASBCA's *ORC* decision, in which the Board held a contract void *ab initio* due to the contractor's misrepresentation of credentials, which were intended to obtain a more favorable evaluation of its proposal, and without which the CO would have found the appellant nonresponsible. *Id.* at 147,653 (citing *ORC, Inc.*, ASBCA No. 49693, 97-1 BCA ¶ 28,750, at 143,491). The Board denied the contractor's claims on other grounds, but not before addressing the BIA's allegations, stating that it was “unnecessary for [the IBCA] to broach the jurisdictional issues . . . under the CDA, 41 U.S.C. § 605(a) . . . [a consideration] potentially inherent in any fact-finding by [the Board] (in contrast to reliance upon a criminal conviction, for example) that Appellant committed fraud.” *Id.* (citing *Hardrives, Inc.*, IBCA Nos. 2319, et al., 91-2 BCA ¶ 23,769, at 119,059–60).

competent jurisdiction and a decision in which the Board renders a contract void based upon its own findings of fraud is a subtle, but important distinction.¹⁴⁶ The GSBCA's *Turner* decision appears to be the only decision that identifies and discusses this point.¹⁴⁷ However, the ASBCA decisions stretching back to the 1990s indicate this distinction continues to be overlooked.¹⁴⁸

To further confuse the issue, the ASBCA has issued six decisions since deciding *C & D* in which it held that it lacked jurisdiction to make determinations of fraud under CDA Sections 7103(a)(5) and 7103(c)(1).¹⁴⁹ None of those decisions cites to *C & D*, *ORC*, or *Schuepferling*. In fact, even

146. Compare AAA Eng'g & Drafting, Inc., ASBCA Nos. 47940, et al., 01-1 BCA ¶ 31,256, at 154,317 (holding that there was sufficient evidence of fraud), with Environmental Sys., Inc., ASBCA No. 53283, 03-1 BCA ¶ 32,167, at 159,053 (finding that they did not have jurisdiction to determine whether the contractor violated the False Claims Act), *aff'd*, ASBCA No. 53283, 03-1 BCA ¶ 32,242; see also *Turner Constr. Co.*, GSBCA No. 15502, 05-2 BCA ¶ 33,118, at 164,122 (holding that an affirmative defense which would turn on a board's finding of fraudulent conduct by appellant is not within the board's jurisdiction).

147. See *Turner Constr. Co.*, 05-2 BCA at 164,122; see also *Beech Gap, Inc.*, ENG BCA Nos. 5585, 5600, 95-2 BCA ¶ 27,879, at 139,076, *aff'd*, 86 F.3d 1177 (Fed. Cir. 1996) (holding that the Board does not have the proper jurisdictional authority to determine issues of fraud and must follow such determinations made by a court of competent jurisdiction).

148. Compare *C & D Constr., Inc.*, ASBCA No. 38661, 90-3 BCA ¶ 23,256, at 116,684 (finding the contract void and denying recovery), with *ERKA Constr. Co., Ltd.*, ASBCA No. 57618, 12-2 BCA ¶ 35,129, at 172,471 (finding that the Board did not have jurisdiction to consider the affirmative defense), and *Servicios y Obras Isetan S.L.*, ASBCA No. 57584, 13-1 BCA ¶ 35,279 at 173,160 (finding lack of jurisdiction for monetary claim, but proper jurisdictional scope for determining if a contract is void *ab initio*). In *ERKA*, the Board correctly cited to both *National Roofing* and *J.E.T.S.* as appeals in which the necessary findings of fraud were made by a court of competent jurisdiction, and not by the ASBCA. *ERKA Constr. Co.*, 12-2 BCA at 172,475 (stating while summarizing its *National Roofing* holding that "we denied the appeal . . . based on the U.S. District Court's conviction of the contractor's officers of conspiracy to defraud, fraud, and bribery . . . ["]"). The Board went on to explain that "we denied the appeal on the ground that the contract was voidable . . . due to the contractor's false certification of its small business size, which led a federal court jury to convict its parent company and officers of false certification." *Id.* A reading of the ASBCA's decision in *ERKA* suggests at least a constructive overruling of the decision in *C & D*, and by implication any cases that relied upon *C & D*. However, the Board in *Servicios y Obras* continued the misapplication of *J.E.T.S.* in citing it for the concept that, when contractors misrepresent terms of a contract during the bidding process, the contract is void or voidable. 13-1 BCA at 173,161. The Board did not recognize the fundamental distinction that the *J.E.T.S.* decision voided a contract based upon a prior conviction of fraud in a court of competent jurisdiction. *Id.* (citing *J.E.T.S. Inc.*, 87-1 BCA at 98,915, 98,917).

149. See *ERKA Constr. Co.*, 12-2 BCA at 172,475 (finding lack of jurisdiction where no proper adjudication exists to show fraud); *Giuliani Associates, Inc.*, ASBCA Nos. 51672, 52538, 03-2 BCA ¶ 32,368, at 160,163-64 (denying dismissal of appeal based on fraud but deciding whether the contract was valid on other merits); *Range Tech. Corp.*, ASBCA No. 51943, 03-2 BCA ¶ 32,290 at 159,773; *Environmental Sys., Inc.*, 03-1 BCA at 159,053 (finding no requirement to decide a violation of the False Claims Act); *AAA Eng'g & Drafting, Inc.*, 01-1 BCA at 154,366 (finding that the ASBCA lacked jurisdiction on a portion of the appeal); *Nexus Constr. Co.*, ASBCA No. 31070, 91-3 BCA ¶ 24,303, at 121,462-65 (holding that the government's withholding of payments was a material breach, which did not touch on issues of fraud), *aff'd*, ASBCA No. 31070, 92-1 BCA ¶ 24,577. The same ASBCA judge authored four of these decisions.

the ASBCA's 2013 decision in *Servicios y Obras* fails to cite to *C & D Construction*, *ORC* or *Schuepferling*, despite reaching the same result in determining fraud.¹⁵⁰

A. *The Board's Jurisdiction Is Not Coextensive with that of Other Courts of Competent Jurisdiction*

The ASBCA decisions finding fraud fail to recognize that the jurisdiction of the Boards and the federal courts are not co-extensive. For example, in the first *Schuepferling* case, the Board assumed it had jurisdiction to make findings of fraud and render a contract void *ab initio*. In reaching this decision, the court cited *K & R Eng'g Co. v. United States* for the well-established principle that "the absence of a criminal conviction . . . for bribery and assuming, *arguendo*, even the absence of a specific showing that the wrongdoing adversely affected the contract, does not preclude [the Board's] holding that the contract was void *ab initio* and cannot be ratified."¹⁵¹ This conclusion reflects a fundamental misunderstanding of the holding of this case. The *K & R Eng'g Co.* decision supports the proposition that the COFC has jurisdiction to find that a contract is void without a criminal conviction (or other adjudication of fraud). *K&R Eng'g Co.* does not stand for the proposition that the ASBCA's jurisdiction, or any other Board's CDA jurisdiction, is co-extensive with the COFC's jurisdiction. Therefore, the Board's decisions in *Schuepferling* and its progeny do not provide the bases for the Board taking jurisdiction under the CDA to make a determination of fraud.¹⁵²

Similarly, the recent decision in *Servicios y Obras Isetan S.L.*¹⁵³ reflects this misunderstanding. In that case, the board cited the CAFC's decision in *Godley v. United States* for the general principle that "a contract tainted by fraud or wrongdoing is void *ab initio*,"¹⁵⁴ and cited the Board's own decision in *J.E.T.S.* for the well-established tenet that "a contract is void or voidable where its award resulted from misrepresentations in the contractor's bid."¹⁵⁵ However, none of

150. *Servicios y Obras Isetan S.L.*, 13-1 BCA ¶ 35,279 at 173,160–61 (misapplying *J.E.T.S., Inc.*, 87-1 BCA at 98,916–17, in which the board determined a contract void based upon a prior conviction of fraud in a court of competent jurisdiction).

151. *Schuepferling GmbH & Co., KG*, ASBCA No. 45564, 98-1 BCA ¶ 29,659, at 146,953 (citing *K & R Eng'g Co. v. United States*, 616 F.2d 469, 474–75 (Ct. Cl. 1980)).

152. *See id.* There is a second, equally compelling, reason why the decisions in *Schuepferling* and its progeny are misplaced. It does not appear that the contractors in the *Fuerth* appeals ever challenged the Board's jurisdiction to make determinations that the contractors committed fraud. The Board never raised the jurisdictional issues with the parties. In fact, in the first *Schuepferling* appeal, the contractor specifically requested that the Board hold an evidentiary hearing to address the allegations that the contract was obtained through bribery or fraud. *Id.* at 146,948. The Board acquiesced and held a one-day evidentiary hearing in Germany to address the bribery allegations where it made its findings of fraud. *Id.* at 146,949.

153. *Servicios y Obras Isetan S.L.*, 13-1 BCA at 173,161.

154. *Id.* (citing *Godley v. United States*, 5 F.3d 1473, 1475 (Fed. Cir. 1993)).

155. *Id.* (citing *J.E.T.S., Inc.*, 87-1 BCA at 98,917).

the decisions the Board relied upon for general principles of law address the issue of whether the Board has jurisdiction to make its own factual determination of fraud.¹⁵⁶ Once again, the Board assumed its jurisdiction to make findings of fraud was co-extensive with the federal courts.¹⁵⁷ However, the GSBCA's *Turner* decision points out that determinations requiring a finding of fraud for a valid affirmative defense is not within the Boards' jurisdiction.¹⁵⁸

B. Simko Remains Good Law Notwithstanding the Board's Ability to Determine Fraud

Although the ASBCA cites authority for its ability to make independent determinations of fraud in rendering a contract void, the CAFC's decision in *Simko* remains the most comprehensive analysis of the extent of the CDA's jurisdiction.¹⁵⁹ However, the Boards *may* render a contract void and dismiss a contract claim *based upon a finding of fraud from a court of competent jurisdiction*.¹⁶⁰ This distinction is relevant when the fraud allegations enter the case and the government raises an affirmative defense.¹⁶¹ Despite this reading of precedent, some ASBCA holdings ignore the jurisdictional limitations set forth in the CDA.¹⁶² In those decisions, the Board did not affirmatively hold

156. *Id.* at 173,161–62.

157. *See supra* notes 143–49 and accompanying text.

158. *Turner Constr. Co. Gen. Servs. Admin.*, GSBCA Nos. 15502, et al., 05-2 BCA ¶ 33,118, at 164,121–23; *Turner Constr. Co. Gen. Servs. Admin.*, GSBCA No. 16840, 06-2 BCA ¶ 33,391, at 165,546–47, 165,551 (holding that a violation of a fraud-based statute is outside the purview of the board's CDA jurisdiction).

159. *See supra* Part I.A.

160. *See supra* Part I.C.2.b.

161. *See cases cited supra* note 69 and accompanying text.

162. *See cases discussed supra* Part II. As recent as August 2013, the ASBCA issued a decision denying a contractor's motion to strike a government affirmative defense of fraud. *Int'l Oil Trading Co.*, ASBCA Nos. 57491, et al., 13-1 BCA ¶ 35,393, at 173,655. In that case, the Board determined that 41 U.S.C. §§ 7103(a)(5) and (c)(1) do not apply to an affirmative defense that the contract at issue is void *ab initio* because the affirmative defense does not seek "any penalty or forfeiture prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine" as forth in Section 7103(a)(5), and the limitation of authority to decide matters of fraud under Section 7103(c)(1) does not include the Board under the meaning of an "agency head," as defined in Section 7101(3). *Id.* at 173,654–55. However, the Board provided no authority for this position other than its own reading of the provisions. *Id.* Moreover, the Board's decision did not reach the overarching question of whether the Board would have jurisdiction to make independent findings of fraud with respect to the government's affirmative defense. *Id.*; *see also* Ralph C. Nash, *Postscript: The Affirmative Defense of Contractor Fraud*, 28 *Nash & Cibinc Rep.* ¶ 2, at 8 (Jan. 2014) (observing that the decision left open the issue of whether the Board can conduct an evidentiary hearing to rule on the government's affirmative defense alleging that the contractor committed fraud).

Despite its failure to settle this critical issue, the Board's holding appears to be at odds with both its own decision in *Env'tl. Sys., Inc.*, ASBCA No. 53283, 03-1 BCA ¶ 32,167 (holding that although a government affirmative defense of fraud may not necessarily invoke a fraud-based statute by name or demand its penalties, the Board does not have jurisdiction to make factual determinations with respect to an alleged violation that effectively tracks the language of the

that it had jurisdiction to independently decide matters of fraud.¹⁶³ Instead, the Board assumed it had jurisdiction to make such findings.¹⁶⁴

IV. CONCLUSION

Although the law remains unsettled, an analysis of the decisions since the CDA's enactment reveals that agency Boards do not have jurisdiction to make independent findings of fraud, consistent with the CAFC's analysis set forth in *Simko* and the CBCA's analysis in *Turner*. However, recent decisions from the ASBCA such as *Servicios y Obras* suggest that the original departure found in *C & D* is alive and well. This holds true despite the ASBCA's contemporary decisions in *ERKA* and *Eyak* stating otherwise. Despite this split of authority, no Board or court has ever affirmatively stated that a Board has CDA jurisdiction to make an independent fraud determination. To date, the issue has never been appealed to the CAFC for clarification.

Given the current state of the law and the complex federal procurement process, the issue should be resolved. Jurisdiction is a fundamental component of our legal system that should be applied consistently. The CDA's jurisdictional limitation over matters of fraud applies equally to appeals before all of the Boards and contractors should not be subject to different interpretations. When codified by statute, jurisdiction is subject to review at the highest level, and therefore must be taken seriously in providing effective dispute resolution.

statute), *aff'd*, ASBCA No. 53283, 03-1 BCA ¶ 32,242, and the GSBCA's decision in *Turner Constr. Co.*, GSBCA No. 16840, 06-2 BCA ¶ 33,391 (holding that a violation of a fraud-based statute is outside the purview of the Board's CDA jurisdiction). The Board's statement that appellant's reliance on *Martin J. Simko Constr., Inc. v. United States*, 852 F.2d 540 (Fed. Cir. 1988) was misplaced is even more curious. The Board held that *Simko* was inapposite because it did not specifically involve an affirmative defense that a contract was void *ab initio* due to fraud or bribery in the formation of the contract. *Id.* However, the procedural context is not relevant to the *Simko* analysis of the language and legislative history of the CDA, in which the CAFC concluded that because Congress had delegated the authority to administer and enforce the FCA (a fraud-based statute) to the Department of Justice, CDA Section 7105(a)(5) means that CDA jurisdiction does not extend to FCA claims or disputes. *See* 852 F.2d at 547-58.

163. *See* cases discussed *supra* Part II.

164. *See* cases discussed *supra* Part II.