UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS GRANTED IN PART AND
DENIED IN PART; APPELLANT'S MOTION FOR
RECONSIDERATION DENIED AS MOOT:
March 25, 2015

CBCA 3871, 3912

SAFE HAVEN ENTERPRISES, LLC

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Jason R. Mischel, Executive Vice President and General Counsel of Safe Haven Enterprises, LLC, New York, NY, counsel for Appellant.

Dennis J. Gallagher, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **SHERIDAN**, and **LESTER**.

LESTER, Board Judge.

Pending before the Board is the motion of the Department of State (DOS or the Government) to dismiss these consolidated appeals for lack of jurisdiction. Also pending is a motion for reconsideration from appellant, Safe Haven Enterprises, LLC (Safe Haven), in which it asks the Board to reconsider a prior order denying it permission to amend its notices of appeal to reflect different jurisdictional facts and to establish a new basis for jurisdiction. For the reasons set forth below, the Board grants that portion of the Government's motion seeking dismissal of Safe Haven's request for punitive damages, but otherwise denies the

Government's motion to dismiss without prejudice, pending further development of the record on disputed jurisdictional facts. The Board also denies as moot Safe Haven's motion for reconsideration.

Background

I. The Contract

In early 2004, DOS awarded an indefinite delivery/indefinite quantity contract, number SALMEC-03-D-0035 (contract 0035), to Safe Haven. On March 26, 2006, DOS issued task order 0002 under this contract for chiller replacement and other construction work at the United States Embassy in Georgetown, Guyana. On August 24, 2006, DOS issued task order 0003 under this contract for environmental security construction work at the United States Embassies in Sana'a, Yemen, and Manama, Bahrain.

II. The Written Claims and the Written Final Decisions

By certified claim submitted to Howard Williams, Jr., the DOS contracting officer (CO Williams), on June 27, 2012, Safe Haven sought $1,827,211.80 for money allegedly due under various task orders issued pursuant to contract 0035, including a claim for $469,916.65 associated with the de-obligation of funds for its work in Yemen and Bahrain under task order 0003. On September 18, 2012, CO Williams issued a final decision denying that claim, with the necessary appeal language from 48 CFR 33.211(a)(4)(v) (2011). *See* Appeal File, Exhibits 34, 35.

By letter to CO Williams dated July 25, 2012, Safe Haven indicated that the Government had not paid a ten-percent retainer, totaling $68,339.65, for equipment that Safe Haven had purchased for its work at Georgetown, Guyana, under task order 0002 (the Georgetown retainer). On August 27, 2012, CO Williams issued a final decision denying what he described as Safe Haven's claim seeking payment of that retainer[1] and included in his final decision the appeal language required by 48 CFR 33.211(a)(4)(v). *See* Appeal File, Exhibit 10.

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[1] The appeal file does not contain a copy of Safe Haven's July 25, 2012, letter. Nevertheless, the Government has represented in its motion to dismiss that the letter satisfies the requirements for a claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). Absent a challenge by the Government, we assume for purposes of this jurisdictional analysis that it meets those requirements.

III. Jurisdictional Allegations in the Notice of Appeal

On May 28, 2014, Safe Haven filed a notice of appeal (docketed as CBCA 3871) relating to the de-obligation of Yemen/Bahrain funds under task order 0003. In its notice of appeal, Safe Haven did not mention that it had submitted a certified claim on that issue or that the contracting officer had issued a written final decision in response to the claim. Nor did it attach to its notice of appeal a copy of its claim or the contracting officer's decision. Instead, it purported to base its appeal solely on an alleged verbal statement of the contracting officer on March 21, 2014, following various communications and meetings between the parties, as follows:

> Appellant . . . learned that a Contracting Officer Technical Representative ("COTR"), who was an independent contractor of the DOS, had authorized the de-obligation of funds totaling $469,916.55 from the Contract . . . in violation of the Federal Acquisition Regulation[] and the Department of State Acquisition Regulation[]. . . . From the time appellant discovered this discrepancy through March 21, 2014, appellant engaged in continuous communications and meetings with the DOS to recover these funds. On March 21, 2014, at a meeting at the DOS, appellant was advised by [the] Contracting Officer . . . that it was the decision of his agency that these funds would not be paid back to appellant.

On June 19, 2014, Safe Haven filed a second notice of appeal (docketed as CBCA 3912), in which it indicated that, despite numerous discussions with the contracting officer, the DOS had not yet paid Safe Haven the Georgetown retainer under task order 0002 and that, at a meeting on March 21, 2014, the contracting officer had represented that he would "look into the issue." Again, in its notice of appeal, Safe Haven mentioned nothing about a previously submitted claim relating to the retainer issue or about any written contracting officer final decision in response to it:

> As part of the contract, appellant purchased all required materials including a 10% retainer in the amount of $68,339.65. The contract was successfully completed and on October 10, 2007 [Safe Haven] sent an invoice to the DOS for payment of the retainer. In early 2008, a DOS Contracting Officer Technical Representative ("COTR") informed Appellant that the retainer would not be paid because the job had "closed out", in violation of applicable laws and regulations . . . . From the time Appellant was told it would not be paid the retainer through March 21, 2014, Appellant engaged in continuous communications and meetings with the DOS to recover these funds. On March 21, 2014, at a meeting with the DOS, Appellant was advised by [the]

> Contracting Officer . . . that he would look into the issue. To date, [the contracting officer] has not provided a ruling on the issue.

IV. Jurisdictional Allegations in the Complaint

At the parties' request, the Board subsequently consolidated the two appeals, and Safe Haven filed a complaint. In its complaint, Safe Haven alleged that, on January 31, 2012, CO Williams "issued a letter," which it referred to as the "Williams Letter," "containing his decision regarding both the Yemen/Bahrain De-Obligated Funds and the Georgetown Retainer," Complaint ¶ 18,[2] but it did not mention that it had previously submitted claims relating to those issues and it did not refer to the "Williams Letter" as a final decision under the CDA. It then alleged that, on February 1, 2013, it met with Mr. Williams and his soon-to-be successor as contracting officer, James Thomas (CO Thomas), at which time both Messrs. Williams and Thomas "agreed to rescind the Williams Letter as factual questions still existed with respect to both the Yemen/Bahrain De-Obligated Funds and the Georgetown Retainer." *Id.* ¶ 22. It further alleged that, on March 21, 2014, CO Thomas "communicated that the DOS had conducted its re-consideration of Williams' decision regarding the Yemen/Bahrain De-Obligated Funds and it was the DOS' final position that these would not be paid to [Safe Haven]." *Id.* ¶ 25. It also alleged that, at that same meeting, CO Thomas "agreed to look into the issue of the Georgetown Retainer." *Id.*

In its answer, the Government denied that, at the meeting on February 1, 2013, either Messrs. Williams or Thomas agreed to rescind what it described as "contracting officer final decisions that had been issued with respect to claims presented by Appellant." Answer ¶ 23. It represented that, contrary to Safe Haven's allegations, "Mr. Thomas recalls that Mr. Williams, who was the cognizant contracting officer" at that time, agreed at the February 1, 2013, meeting "to consider withdrawing his decision if Appellant would present a written request stating the rationale therefor." *Id.* The Government then alleged that it "is not aware that any such written request was ever made or acted upon." *Id.*

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[2] There is no letter in the appeal file dated January 31, 2012. The only two letters from the DOS contracting officer in the appeal file purporting to decide the Yemen/Bahrain de-obligation of funds dispute and the Georgetown retainer dispute are those previously identified, dated August 27 and September 18, 2012. In its answer to Safe Haven's complaint, the Government represents that it is unaware of a letter dated January 31, 2012. Answer ¶ 18.

V. The Parties' Pending Motions

On October 3, 2014, the DOS filed a motion to dismiss both of Safe Haven's appeals for lack of jurisdiction, arguing that Safe Haven's notices of appeal did not identify a viable jurisdictional basis and that, in any event, the appeals were time-barred because, despite Safe Haven's failure to mention the contracting officer's final decisions of August 27 and September 18, 2012, the appeals were filed more than ninety days after Safe Haven received those decisions. The DOS also asked that, to the extent that the appeals were not dismissed in their entirety, the Board dismiss the monetary requests in Safe Haven's complaint based upon fraud and for punitive damages.

Safe Haven responded with a request to change the basis of its jurisdictional allegations and argued that, after the two final decisions were issued, the DOS contracting officer agreed to reconsider them, which, it argued, suspended the time for appeal. Attached to its request was an affidavit from its former counsel, in which the attorney declared that, at a meeting on February 1, 2013, both CO Williams and CO Thomas expressly told him and Safe Haven's owner that "any deadline for filing an action to appeal the decisions in either the Civilian Board of Contract Appeals or the United States Court of Federal Claims, would be void" because "the Final Decisions were being reconsidered as the Bureau of Overseas Operations was going to audit the projects as factual questions existed as to both the Yemen/Bahrain Deobligated Funds and the Georgetown Retainer." Affidavit of Bradley S. Deutchman ¶ 4. Relying upon this affidavit and some other documentary evidence, Safe Haven argued that the deadline for appeal was eliminated. It further asserted that, on March 21, 2014, "after continued communications with the DOS," the successor contracting officer, CO Thomas, informed Safe Haven, for the first time, that the DOS "had conducted its re-consideration" of the Yemen/Bahrain de-obligated funds decision and decided not to pay the funds to Safe Haven, but that he would "look into the issue of the Georgetown retainer." Appellant's Response at 6-7. Safe Haven then argued that its appeals following those March 21, 2014, representations were timely.

The DOS disputed Safe Haven's evidence. Although acknowledging that a meeting took place on February 1, 2013, the DOS has provided an affidavit from CO Thomas denying that, at that meeting, either contracting officer made the representations that Safe Haven alleges, and the DOS noted that Safe Haven has not submitted any e-mail messages or other correspondence from after the February 1, 2013, meeting evidencing that such representations occurred. The DOS has also suggested that CO Williams may have represented during the February 1, 2013, meeting that the Government would consider withdrawing one or both of the contracting officer's final decisions if Safe Haven would present a written request establishing a rationale for doing so, but that no such written request was ever made.

By order dated January 9, 2015, the Board Judge then assigned to these appeals denied Safe Haven's request to change the jurisdictional basis of its appeals. On February 9, 2015, Safe Haven filed a motion for reconsideration of that order, which is now pending before the Board. The cases were subsequently reassigned to the current presiding Judge.

Discussion

I. Standard of Review

The Board's jurisdiction is derived from the CDA, 41 U.S.C. §§ 7101-7109. "[T]he strict limits of the CDA" constitute "jurisdictional prerequisites to any appeal." *England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004). If jurisdiction is found to be lacking, the Board must dismiss the case. *Universal Canvas, Inc. v. Stone*, 975 F.2d 847, 850 (Fed. Cir. 1992).

"When considering a motion to dismiss for lack of subject matter jurisdiction, a tribunal accepts as true the undisputed allegations in the complaint and draws all reasonable inferences in favor of the plaintiff." *McAllen Hospitals, LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,970 (citing *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011)). "Nevertheless, when a question of the tribunal's jurisdiction is raised, 'either by a party or by the [tribunal] on its own motion, the [tribunal] may inquire, by affidavits or otherwise, into the facts as they exist.'" *Id.* (quoting *Land v. Dollar*, 330 U.S. 731, 739 n.4 (1947)). The party seeking to invoke a tribunal's subject matter jurisdiction "bears the burden of establishing [it] by a preponderance of the evidence." *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988).

II. Deficiencies in Safe Haven's Original Jurisdictional Allegations

When Safe Haven originally filed its notices of appeal in these consolidated cases, it did not mention that it had submitted written claims to the contracting officer and that the contracting officer had issued two written final decisions, and it did not attach the contracting officer's decisions to its notice. The only basis that Safe Haven identified for jurisdiction was that the contracting officer, following a series of communications and meetings with Safe Haven, orally stated that the Government would not pay any money for the Yemen/Bahrain de-obligation of funds dispute and that he would look into the Georgetown retainer issue. In its complaint, it again did not mention any written claim submission. Although it identified a January 2012 letter from the contracting officer that it described as the "Williams Letter," it did not describe that letter as a written final decision. Again, it merely suggested that, after a series of meetings and communications, the contracting officer

orally informed it on March 21, 2014, that the Government would not pay the Yemen/Bahrain claim and would consider the Georgetown retainer issue.

It is the appellant's burden to plead "facts necessary to establish the Board's jurisdiction." *Integrated Systems Analysts, Inc.*, GSBCA 10750-P, 91-1 BCA ¶ 23,477, at 117,776 (1990). In Federal court, the party bringing a case is required under Federal Rule of Civil Procedure 8(a)(1) to include those jurisdictional allegations in its complaint for the court's evaluation. Before the Board, because the notice of appeal rather than the complaint initiates a case, it is generally "the notice of appeal, not the complaint, that establishes the bounds of jurisdiction." *Gardner Zemke Co.*, IBCA 2626, 90-3 BCA ¶ 23,064, at 115,800 n.7 (citing *Crawford Technical Services, Inc.*, ASBCA 36732, 89-2 BCA ¶ 21,783, at 109,608); *see Cafritz Co. v. General Services Administration*, GSBCA 13525, 97-1 BCA ¶ 28,969, at 144,263.

In both of its notices of appeal, Safe Haven relies upon verbal statements from the contracting officer on March 21, 2014, as its basis for appeal, without mentioning the existence of preceding written claims. Under the CDA, the Board cannot assume jurisdiction over a contractor's request for monetary relief unless the contractor previously submitted to the agency's contracting officer, in writing, a claim seeking payment of a sum certain and requesting a final decision. 41 U.S.C. § 7103(a)(1), (2); *see Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575-76 (Fed. Cir. 1995) (en banc) (a written claim to the contracting officer is a jurisdictional prerequisite). Once the contractor receives the contracting officer's final decision denying the claim, the contractor has ninety days to appeal that decision to the Board. 41 U.S.C. § 7104(a). That final decision must be in writing. 41 U.S.C. § 7103(a)(3); *see Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1267 (Fed. Cir. 1999); *Paradigm Learning, Inc. v. United States*, 93 Fed. Cl. 465, 474 (2010). Alternatively, if the contracting officer does not issue a written decision within the statutory time limits, the contractor can appeal the contracting officer's "deemed denial" of the written claim. 41 U.S.C. § 7103(f)(5); *see CB&I Federal Services LLC v. Department of Homeland Security*, CBCA 3112, et al., 14-1 BCA ¶ 35,550, at 174,210.

Pursuant to CBCA Rule 2(a)(1), an appellant is expressly required to identify the basis of the Board's jurisdiction in its notice of appeal by describing the contracting officer's final decision being appealed "in enough detail to enable the Board to differentiate that decision from any other." 48 CFR 6101.2(a)(1)(i) (2014). "If an appeal is taken from the failure of a contracting officer to issue a decision" – that is, the contracting officer's "deemed denial" – "the notice of appeal should describe in detail the claim that the contracting officer has failed to decide." *Id.* Here, the notices of appeal do not identify any written final decisions or written claims or attach any decisions or claims. They identify only verbal representations

by the contracting officer about a dispute, following various discussions that do not include the contractor's submission of a written claim. That is not a viable jurisdictional basis.

III. A Different Jurisdictional Basis Identifiable from the Record

A. The Board's Obligation to Consider Unalleged Jurisdictional Bases

Despite the defect in the notices of appeal, it is clear from the record that there is a potential jurisdictional basis for maintaining these appeals. As the Government acknowledges in its answer, and as the appeal file establishes, Safe Haven submitted a claim relating to the Yemen/Bahrain de-obligated funds issue underlying CBCA 3871 on November 29, 2011; Safe Haven certified that claim in accordance with the requirements of the CDA on June 27, 2012; and the contracting officer denied that claim in a written final decision on September 18, 2012. Further, the Government acknowledges in its motion to dismiss that Safe Haven submitted a claim relating to the Georgetown fund issue underlying CBCA 3912 on July 25, 2012, seeking a final decision of the contracting officer in an amount below the threshold requiring claim certification, and that the contracting officer issued a written decision denying the claim on August 27, 2012. Relying upon these jurisdictional facts, the Government argues in its motion to dismiss that, if we look beyond the facts alleged in the notices of appeal, Safe Haven's appeals to the Board are untimely because they were filed more than ninety days after the written final decisions were issued. In its response to the Government's motion, Safe Haven has submitted an affidavit in which its former attorney avers that, after the written final decisions were issued, the contracting officer affirmatively agreed to reconsider the decisions, an act that it asserts eliminated the time for appeal.

Although these allegations do not appear in the notices of appeal or even in Safe Haven's complaint, and although an appellant acts at its peril in failing to identify a viable jurisdictional basis in its notice of appeal, we are loath to dismiss a case for lack of jurisdiction based simply upon an initial pleading defect. Federal courts are specifically directed by statute to permit amendments of defective jurisdictional allegations: "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. § 1653; *see Newman–Green, Inc. v. Alfonzo–Larrain*, 490 U.S. 826, 832 (1989) (courts can "remedy inadequate jurisdictional allegations, but not defective jurisdictional facts"); *Haxton v. State Farm Mutual Automobile Insurance Co. Board of Directors*, No. 13-485, 2014 WL 3586550, at *4 (M.D. Fla. July 21, 2014) ("Although a defect in subject matter jurisdiction cannot be waived, pleading defects . . . may be cured"). Although the statute is addressed to the courts' discretion, "usually the section is to be construed liberally to permit the action to be maintained if it is at all possible to determine from the record that jurisdiction does in fact exist." *Cox v. Livingston*, 407 F.2d 392, 393 (2d Cir. 1969) (quoting

John Birch Society v. National Broadcasting Co., 377 F.2d 194, 198–99 (2d Cir. 1967)). Even without regard to that statute, it is clear that, as a general principle, courts have wide discretion to look to "the whole record" if an appellant "fail[s] to properly allege" facts supporting jurisdiction and that insufficient allegations "will not . . . defeat the jurisdiction of the [tribunal] if, as a matter of fact," review of the record establishes a basis for jurisdiction. *Kelleam v. Maryland Casualty Co. of Baltimore*, 112 F.2d 940, 943 (10th Cir. 1940), *rev'd on other grounds*, 312 U.S. 377 (1941). Accordingly, if the tribunal discovers that "requisite [jurisdictional facts are] anywhere averred in the record, or facts are therein stated which in legal intendment constitute such allegations, that is sufficient" to permit the court to consider the merits of the case. *Id.*; *see Sun Printing & Publishing Association v. Edwards*, 194 U.S. 377, 382 (1904) ("The whole record, however, may be looked to, for the purpose of curing a defective averment of citizenship, where jurisdiction in a Federal court is asserted to depend upon diversity of citizenship, and if the requisite citizenship is anywhere expressly averred in the record, or facts are therein stated which, in legal intendment, constitute such allegation, that is sufficient."); *Howe v. Howe & Owen Ball Bearing Co.*, 154 F. 820, 822 (8th Cir. 1907) ("The jurisdiction of a federal court may not be renounced or denied where the facts requisite to confer it appear either directly or by just inference from any part of the record.").

Given that federal courts generally exercise their discretion to overlook initial pleading defects and assume jurisdiction if they discover that the record supports jurisdiction, it is even more incumbent upon the Board to do so. In the CDA, Congress provided that the Board shall "to the fullest extent practicable provide informal, expeditious, and inexpensive resolution of disputes." 41 U.S.C. § 7105(g)(1). Although the Board's rules identify requirements for notices of appeal, *see* 48 CFR 6101.2(a)(1), we are to construe our rules liberally to provide for the informal and just resolution of matters before us, 41 CFR 6101.1(c), and we are entitled to modify our rules when necessary to achieve those goals. *Id.* 6101.1(d). Although we are never required to scour the record to try to uncover an uncited basis for an appellant's case, *see 1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, slip op. at 17 (March 17, 2015), we should exercise our discretion to forgive possible defects or omissions in notices of appeal and pleadings if, during the course of proceedings, we actually become aware that the record supplies an uncited basis for jurisdiction. A contractor should not lose its right to appeal merely because it makes an initial misstep in identifying existing jurisdictional facts.

Here, even though not mentioned in Safe Haven's notice of appeal or even its subsequent complaint, the record makes clear that Safe Haven submitted two written claims pursuant to the CDA, that the contracting officer issued written final decisions on both of them, and that the record contains evidence supporting an argument that the contracting officer reconsidered the final decisions in such a manner that, if true, could mean that the

appeals were timely filed. In these circumstances, we will consider this jurisdictional argument. Because we have agreed to evaluate this jurisdictional argument based upon the existing record, we deny as moot Safe Haven's request, through its motion for reconsideration, that we permit it to amend its notices of appeal.

B. The Contracting Officer's Alleged Reconsideration of His Final Decisions

A contractor, after receiving a written final decision from the contracting officer, may appeal that written decision to a board of contract appeals "[w]ithin ninety days from the date of receipt of [the] decision." 41 U.S.C. § 7104(a). Alternatively, within twelve months from the date of the contractor's receipt of the contracting officer's final decision, a contractor may file its appeal with the United States Court of Federal Claims. *Id.* § 7104(b).

These deadlines for filing have been strictly construed by the Court of Appeals for the Federal Circuit. The Court has repeatedly held that, because the authorization to make the filing is a waiver of the Government's sovereign immunity, failure to file an appeal within the ninety-day deadline divests the Board of jurisdiction to consider the case on its merits. *See, e.g.*, *D.L. Braughler Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997); *West Coast General Corp. v. Dalton*, 39 F.3d 312, 315 (Fed. Cir. 1994); *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982). Here, the contracting officer issued his final decisions on the Georgetown retainer claim and the Yemen/Bahrain de-obligation of funds claim on August 27 and September 18, 2012, respectively. Safe Haven did not file an appeal of the disputes underlying either final decision until more than twenty months after those final decisions were issued. On its face, Safe Haven's failure to appeal those final decisions within ninety days of their issuance would appear to preclude us from entertaining jurisdiction over them.

Safe Haven, however, now argues that the time limits for appeal were eliminated or tolled because Safe Haven requested reconsideration of, and the contracting officer agreed to reconsider, the written final decisions. Even though the Federal Acquisition Regulation does not address reconsideration of a previously issued final decision, contracting officers plainly have the authority to reconsider their own decisions. *Riverside General Construction Co.*, IBCA 1603-7-82, 82-2 BCA ¶ 16,127, at 80,049. "While a board cannot extend the time for appeal, an appeal period can be tolled where one finds that a [contracting officer's] decision was not truly final but was being reconsidered. In that instance, the time for appeal begins to run with the contractor's receipt of the reconsideration." *Staff Inc.*, AGBCA 95-181-1, et al., 96-1 BCA ¶ 28,051, at 140,071 (1995). In *Devi Plaza, LLC v. Department of Agriculture*, CBCA 1239, 09-1 BCA ¶ 34,033 (2008), the Board addressed the standard that we should apply in evaluating whether a final decision is no longer effective because the contracting officer reconsidered it:

> It is well-established that, if a [contracting officer's] decision is not truly "final," but being reconsidered, a "failure to appeal from the decision within the prescribed period will not defeat . . . [a] contractor's opportunity to be heard on the merits." *E.g.*, *Johnson Controls, Inc.*, ASBCA No. 28340, 83-2 BCA ¶ 16,915 at 84,170. As the Court of Claims explained in *Roscoe-Ajax Constr. Co. v. United States*, 458 F.2d 55, 63, 198 Ct. Cl. 133, 148 (1972) a [contracting officer's] agreeing to meet with a contractor and "to reconsider the question, serve[s] to keep the matter open and necessarily destroy[s] any finality the [contracting officer's] decision theretofore had." Accordingly, to ascertain if this appeal is timely, we must determine whether the "finality" of the [contracting officer's] decision was vitiated.

Id. at 168,337 (quoting *Sach Sinha & Associates*, ASBCA 46916, 95-1 BCA ¶ 27,499, at 137,041).

It is clear that "[a] contractor is not entitled to an automatic extension simply because he requests reconsideration." *Staff*, 96-1 BCA at 140,071. Rather, "there must be some action, either express or implied on the part of the [contracting officer] that indicates that he is willing to reconsider the final decision, and it is the [contracting officer's] agreement to reconsider that triggers the extension." *Merritt Lumber Co.*, AGBCA 88-313-1, et al., 89-2 BCA ¶ 21,676, at 109,009-10. In *Devi Plaza*, the Board adopted the following test for determining whether the finality of a contracting officer's decision has been vitiated: "the issue to be resolved with respect to vitiation of 'finality' is whether the contractor presented evidence showing it reasonably or objectively could have concluded the [contracting officer's] decision was being reconsidered." 90-1 BCA at 168,337 (quoting *Sach Sinha & Associates*, 95-1 BCA at 137,042).[3]

Here, the parties have presented very different, and conflicting, versions of their communications after the final decisions were issued. Safe Haven's former counsel attests that the contracting officer and his successor expressly represented that the appeal deadlines

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[3] *See, e.g.*, *Royal International Builders Co.*, ASBCA 42637, 92-1 BCA ¶ 24,684, at 123,134 (finality vitiated where the contracting officer's actions "created sufficient uncertainty" that contractor "could reasonably believe that the initial decision was not final"); *Birken Manufacturing Co.*, ASBCA 36587, 89-2 BCA ¶ 21,581, at 108,669 (finality attached where contractor was not reasonably led to believe that decision was being reconsidered); *Johnson Controls, Inc.*, ASBCA 28340, 83-2 BCA ¶ 16,915, at 84,170 (finality vitiated where contracting officer met with contractor to discuss decision and did not "make it very clear" that original appeal period "continues to run").

were void and that they were reconsidering the final decisions, while the Government denies those allegations. "In a situation where the parties dispute the predicate facts allegedly giving rise to the [trial tribunal's] jurisdiction, the [tribunal] will often need to engage in some preliminary fact-finding." *Skwira v. United States*, 344 F.3d 64, 71-72 (1st Cir. 2003). "In that situation, the [tribunal] 'enjoys broad authority to order discovery, consider extrinsic evidence, and hold evidentiary hearings in order to determine its own jurisdiction.'" *Id.* at 72 (quoting *Valentín v. Hospital Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001)); *see Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947) ("As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial [tribunal]." (quoting *Gibbs v. Buck*, 307 U.S. 66, 71-72 (1939)). To the extent that "the jurisdictional facts, though genuinely disputed, are inextricably intertwined with the merits of the case," the tribunal may even "defer resolution of the jurisdictional issue until the time of trial." *Valentin*, 254 F.3d at 363 n.3. In the circumstances here, we believe it appropriate to obtain the parties' views on how to proceed in resolving this jurisdictional factual dispute, including whether a short evidentiary hearing to permit the parties to present evidence regarding the factual issue is necessary.

IV. Fraudulent Misrepresentation and Punitive Damages

The Government requests that, if we do not dismiss Safe Haven's complaint in its entirety, we dismiss the two counts of Safe Haven's complaint alleging fraudulent misrepresentation, as well as its request for punitive damages.

Fraudulent Misrepresentation. Safe Haven alleges in two counts of its complaint that the Government made fraudulent misrepresentations that either caused or independently constituted breaches of contract.[4] The Government argues that the CDA "expressly denies the contracting officer authority to decide claims involving fraud" and that, since the contracting officer cannot consider Safe Haven's fraud allegations, neither can the Board. Respondent's Motion at 7 (citing 41 U.S.C. § 7103(c)). Yet, the section of the CDA to which the Government refers "applies only to fraud claims made by the Government against a

[4] In count IV of its complaint, Safe Haven alleges that it "was given multiple reasons from various personnel at the DOS as to the reason why the funds were de-obligated" from its Yemen/Bahrain task order, some of which allegedly involved fraud, such that the DOS "knowingly, fraudulently intentionally misrepresented" to Safe Haven "both the de-obligation of funds as well as the reasons for doing so, with the intent to deceive" Safe Haven. Complaint ¶ 46. In count VIII, Safe Haven alleges that the reason given "to justify not returning the Georgetown Retainer was a fraudulent and intentional misrepresentation" to Safe Haven, "with the intent to deceive" Safe Haven. *Id.* ¶ 77.

contractor, not *vice versa*." *INSLAW, Inc. v. United States*, 35 Fed. Cl. 295, 306 (1996) (citing *Martin J. Simko Construction, Inc. v. United States*, 852 F.2d 540, 542-44 (Fed. Cir. 1988)). The CDA does not bar a contracting officer from considering a contractor's monetary contract claim simply because it includes, as part of the allegations of breach, allegations that the Government acted fraudulently. We cannot grant the Government's motion to dismiss on that basis.

The Government alternatively argues that fraudulent misrepresentation is a tort over which the Board cannot exercise jurisdiction. Respondent's Reply Brief at 4. It is true that the Board is barred "from handling fraud *qua* fraud claims." *Rockwell International Corp.*, EBCA C-9509187, et al., 97-2 BCA ¶ 29,322, at 145,794; *see L'Enfant Plaza Properties, Inc. v. United States*, 645 F.2d 886, 892 (Ct. Cl. 1981) (fraud, independent of a contract, is a tort over which court lacks jurisdiction); *Environmental Safety Consultants, Inc.*, ASBCA 53485, 02-2 BCA ¶ 31,904, at 157,613 ("The Board does not have jurisdiction over criminal or civil fraud and would not have jurisdiction over a claim of fraud."). We specifically "lack jurisdiction to consider a claim alleging the tort of misrepresentation." *Mitchell v. General Services Administration*, GSBCA 16209, 04-1 BCA ¶ 32,551, at 160,996 n.3; *see National Gypsum Co.*, ASBCA 53259, 03-1 BCA ¶ 32,054, at 158,455 & n.2 (2002) ("[w]e have no jurisdiction over tort claims," including "misrepresentation").

Nevertheless, "a claim of misrepresentation [is] 'not barred simply because it might also be stated as a tort.'" *PAE International*, ASBCA 48922, 95-2 BCA ¶ 27,787, at 138,590 (quoting *Olin Jones Sand Co. v. United States*, 225 Ct. Cl. 741, 745 (1980)). If the appellant's "misrepresentation claim is entirely dependent on, and in fact evolves from the contract," it is properly characterized as a breach of contract claim. *Badgley v. United States*, 31 Fed. Cl. 508, 514 (1994); *see Chain Belt Co. v. United States*, 115 F. Supp. 701, 712 (Ct. Cl. 1953) ("[a] tortious breach of contract is not a tort independent of the contract so as to preclude an action"); *Houston Ship Repair, Inc. v. United States Department of Transportation, Maritime Administration*, DOT BCA 4505, 06-2 BCA ¶ 33,381, at 165,492 (2007) (Board may "exercise jurisdiction over a tortious breach of contract"); *HK Contractors, Inc.*, DOT BCA 2766, 96-1 BCA ¶ 28,175, at 140,645 ("The fact that a claim speaks of 'tortious' actions does not *per se* deprive the Board of jurisdiction."). An appellant's references to alleged fraudulent Government misrepresentations that affected contract performance "are merely another way of asserting that a breach of contract occurred." *Olin Jones Sand*, 225 Ct. Cl. at 745. Here, the damages that Safe Haven seeks for fraudulent misrepresentation duplicate and mirror those that it seeks under the counts of its complaint for breach of contract, breach of the implied duty of good faith and fair dealing, and negligent misrepresentation. Safe Haven plainly intends its fraudulent misrepresentation counts to relate to breaches of contract. In such circumstances, Safe Haven's claim of fraudulent misrepresentation "is in substance a 'claim for breach of contract by

misrepresentation.'" *Schweiger Construction Co. v. United States*, 49 Fed. Cl. 188, 206 (2001) (quoting *Badgley*, 31 Fed. Cl. at 514). Such a claim is properly within our jurisdiction. *See Olin Jones Sand*, 225 Ct. Cl. at 745; *see SIA Construction, Inc.*, ASBCA 57693, 14-1 BCA ¶ 35,762, at 174,986 ("[t]he Board [has] jurisdiction under the CDA to decide the contract rights of the parties even when fraud has been alleged" (quoting *Public Warehousing Co. K.S.C.*, ASBCA 58078, 13 BCA ¶ 35,460, at 173,896)). Accordingly, to the extent that Safe Haven seeks damages arising out of the contract, we possess jurisdiction over Safe Haven's fraudulent misrepresentation claim.[5]

Punitive Damages. As for Safe Haven's request for punitive damages, Safe Haven has identified no basis for such a demand. "Absent express consent of Congress, punitive damages may not be awarded against the United States." *Crutcher v. General Services Administration*, GSBCA 15586, 02-1 BCA ¶ 31,763, at 158,878; *see Mastrolia v. United States*, 91 Fed. Cl. 369, 382 (2010) ("The United States has not waived sovereign immunity with regard to punitive damages."). The CDA, under which we derive jurisdiction, does not contain such a waiver. We dismiss Safe Haven's request for punitive damages.

Decision

For the foregoing reasons, Safe Haven's motion for reconsideration of the Board's January 9, 2015, order is hereby **DENIED AS MOOT**. The Government's motion to dismiss Safe Haven's request for punitive damages is **GRANTED**, but the motion to dismiss is otherwise **DENIED**, subject to reconsideration after further factual development. By

[5] Oddly, although arguing that we cannot consider the counts of Safe Haven's complaint alleging fraudulent misrepresentation because they are tort-based, the Government did not seek to dismiss the two counts of Safe Haven's complaint based upon negligent misrepresentation. Claims "sounding in tort" include those "based on negligent misrepresentation." *Somali Development Bank v. United States*, 508 F.2d 817, 821 (Ct. Cl. 1974). Nevertheless, for the same reasons that we can consider contract claims alleging fraudulent misrepresentation, we can consider contract claims alleging negligent misrepresentation – they are both entirely dependent upon, and evolve from, the contract.

separate order, the Board will provide the parties an opportunity to address the manner in which they wish to proceed in resolving disputed jurisdictional facts.

HAROLD D. LESTER, JR.
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

PATRICIA J. SHERIDAN
Board Judge