ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Dongbuk R&U Engineering Co., Ltd.	)	ASBCA No. 58300
	)	
Under Contract No. W91QVN-08-D-0037	)	

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OPINION BY ADMINISTRATIVE JUDGE HARTMAN
ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

The government moves for summary judgment on the grounds of fraud based upon "Appellant's President's criminal conviction for submitting forged technicians' licenses to the government in order to deceptively procure the award of the contract." According to the government, "[g]iven this fraud ab initio, the Board lacks subject matter jurisdiction over the subject appeal" to recover "payment for services rendered related to the Project for the period from June to August 2011." (Government's Motion for Summary Judgment (Gov't SJM) at 1; Complaint (Compl.) ¶ 1) Appellant contends in both its response (App. Opp'n) and sur-reply (App. Sur-reply) to the summary judgment motion that there are issues of material fact in dispute between the parties precluding us from granting the summary judgment motion. It asserts discovery would show the same or similar HVAC problem arose with respect to the follow-on contractor whose contract also was terminated, the government relaxed the license requirement when subsequently re-competing this work, its contract requirements for Class I technicians were overly burdensome, and had the Government properly determined whether companies bidding for appellant's Contract could reasonably meet the requirement, the "Class 1 license fraud" issue would not have arisen. (App. Opp'n at 1-4; App. Sur-reply at 1-2)

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

On 25 June 2008, the U.S. Army Contracting Command Korea issued Solicitation No. W91QVN-08-R-0132 for Military Family Housing (MFH) maintenance services at Osan Air Base in the Republic of Korea (ROK) (R4, tab 3 at 1, 34). The Solicitation stated in paragraph 30.1 of its Performance Work Statement (PWS) that a contractor "shall have on staff at least one employee" who has a license for civil, electrical, and mechanical engineering issued by the Human Resources Development Service of Korea, and in paragraph 30.3 of its PWS that:

> The contractor shall ensure employees performing the following types of work have the following current and valid professional license or will be working under the supervision of an employee so licensed before starting work:
>
> - Building Plumbing Technician: The plumber shall possess a technician license (Class I) issued by ROK Government in plumbing repair with at least three years of experience.
>
> - Heating, Ventilating and Air Conditioning Mechanic Technician: The Mechanic shall possess a technician license (Class I) issued by ROK Government in mechanical repair with at least three years of experience.
>
> - Electrician: The Electrician shall possess a technician license (Class I) issued by ROK Government in electrical repair with at least three years of experience.

(R4, tab 3 at 44-45) The Solicitation further stated offerors were required to submit a technical proposal with "licenses for the staff" (referencing "Paragraph 30.1") and resumes for the plumber, mechanic, and electrician (referencing "Paragraph 30.3") "to meet the required experience and qualification[s]" stated in the PWS (R4, tab 3 at 89-90).

Appellant, Dongbuk R&U Engineering Co., Ltd. (Dongbuk), submitted a revised and final proposal for the Solicitation on or about 28 July 2008. The revised proposal specifically supplemented its original proposal with a Class I HVAC Mechanical Engineer license and a reduced price quotation. Dongbuk stated in the revised proposal under "Organization and Manpower" that its:

> **Maintenance and Repair Shop** has 6 technicians of each technical area and 3 general workers to support professionals for performance of service requirements by service calls or

> requirement orders. The required professional licenses and career description of employees are presented in section ***1. Licenses*** and ***2. Personnel Qualification*** of ***II. Technical Proposal.*** [Emphasis in original]

(R4, tab 5 at 8) In section II of its revised technical proposal under "1. Licenses," Dongbuk listed "1st Class" Mechanical Engineer, Plumbing Technician, HVAC Mechanical Engineer and Electric Engineer, and appended "[t]he copy of licenses." In Section II under "2. Personal [sic] Qualification," Dongbuk proposed "qualified key technical personnel for the performance of this solicitation," including a "1st Class" Mechanical Engineer, Plumbing Technician, HVAC Mechanical Engineer and Electric Engineer, and appended a "Resume" for each showing they possessed "1st Class" licenses. The revised proposal stated the technical personnel listed "*Comply*" with the "Special Qualifications" set forth in Solicitation paragraphs 30.1 through 30.3. Similarly, the revised proposal further stated personnel "*Comply*" with the Solicitation's Personnel Qualification and License requirements. (R4, tab 5 at 2, 15, 16-19, 20-26, 32-33, 39)

Dongbuk's revised proposal included an organization chart indicating its licensed technicians would be located at Osan Air Base (R4, tab 5 at 28-29). The proposal also represented that it complied with FAR 52.203-3, GRATUITIES (APR 1984), and Dongbuk was bound by all certifications and representations set forth (R4, tab 5 at 42, 61).

In a cover letter for the revised proposal, Dongbuk's president and chief executive officer (CEO), Kyu-Hwan Lee, stated:

> **Based on the notification after initial proposal evaluation, we submits [sic] this revised proposal with supplement of key technical personnel with right qualifications**. 1st Class HVAC Mechanical Engineer...which caused by miss-interpretation [sic] of requirement. And we also would likes [sic] to propose and kindly be accepted our **revised price quotation with lower pricing as a result of cost reduction efforts from previous proposal**. [Bold added]

(R4, tab 5 at 2)

Government contracting officials reviewed Dongbuk's revised proposal for conformance to the Solicitation, specifically noting it included Class I licenses issued by the ROK for the plumbing, HVAC, and electrician technician (R4, tab 6). Contracting officials thus relied on Dongbuk's inclusion of a Class I HVAC technician license and Dongbuk's various representations that it possessed qualified key technical personnel and would utilize such personnel in the performance of contract work, including a "1st Class" HVAC Mechanical Engineer.

In August 2008, the U.S. Army Contracting Command Korea awarded to the appellant, Dongbuk, the requirements Contract No. W91QVN-08-D-0037 to perform maintenance and custodial services for MFH at Osan Air Base in the ROK for one base period and four option periods (R4, tab 1 at 1, 3, 36, 93). The contract's PWS was identical to that set forth in the Solicitation and incorporated FAR 52.203-3, GRATUITIES (APR 1984). (*Compare* R4, tab 1 at 36-48 *with* R4, tab 3 at 34-46, 95)

In August of 2009, the Army exercised the first option period of the contract, thereby extending the contract's term (R4, tabs 7, 8). During April of 2010, the contracting officer (CO) issued a Contract Discrepancy Report notifying Dongbuk of improper maintenance of two HVAC systems which damaged those systems and the occurrence of an environmental violation (R4, tab 9 at 1-2). Dongbuk denied damaging the systems but admitted responsibility for the environmental violation (R4, tab 10 at 2-3).

During August of 2010, the Army exercised the second option period of the contract, thereby extending the contract's term another year (R4, tabs 17, 18). In January of 2011, the 5th Field Investigation Squadron (FIS), Air Force Office of Special Investigations (AFOSI) initiated an investigation of Dongbuk's contract performance as a result of its receipt of an anonymous letter detailing alleged fraudulent activity by Dongbuk under the contract. About one week later, on 11 January 2011, AFOSI learned from the Human Resource Development Service of Korea that none of Dongbuk's 27 employees listed as having worked at Osan Air Base possessed a certificate of national technical qualification. (R4, tab 19) Two days later, AFOSI asked the issuing authority, South Korea's Human Resource Development Service, to review the five certificates of technical qualification attached to Dongbuk's revised contract proposal and was advised two of the attached certificates for plumbing and electrical had been altered from 2nd Class to 1st Class (R4, tab 20). Contemporaneously, AFOSI queried the Defense Biometric Identification System (DBIDS), which controls all military facilities in South Korea, and found that none of the technician employees listed in Dongbuk's contract proposal as possessing Class I licenses ever accessed any U.S. Forces Korea (USFK) installation during the period of contract performance. The investigators further found that the HVAC Class I technician listed in the proposal was never issued a USFK installation pass even though non-USFK personnel are required to obtain such a pass prior to entering an installation. Several days later, AFOSI learned from a former Dongbuk electrician that he did not hold a Class I license while performing work under the contract and that all Dongbuk invoices for reimbursable material costs submitted had been inflated. (R4, tab 22 at 1) As a result of its investigation, AFOSI referred the matter to the local Korean prosecutor's office for possible prosecution and to the Secretary of the Air Force, Deputy General Counsel for suspension and debarment action (*id.* at 2).

In April 2011, the local Korean prosecutor's office questioned Mr. Kyu-Hwan Lee, CEO of Dongbuk. In a sworn statement to the prosecutor resembling an American legal

deposition, which was later translated by a U.S. Army private first class, Mr. Lee admitted to using resumes found in Dongbuk's human resources pool of files for former and potential employee hires to append to Dongbuk's contract proposal. He additionally stated that Dongbuk never hired these Class I licensed technicians because it was too expensive to do so, it instead hired unlicensed or Class II technicians in violation of the contract terms; USFK required 1st Class technicians and would not have wanted to sign the contract if it had known 1st Class technicians were not being employed, and there was a high possibility that his company would have been at a disadvantage in obtaining the contract if it had not supplied with its proposal the resumes identifying its employees as Class I technicians. (Gov't SJM, ex. H at 2, 5, 9-12) Mr. Lee noted that CO Representative (COR) Hee-Kook Song was aware the technicians being used were not Class I, but he believes the COR did not tell the CO (*id.* at 10).

In May of 2011, the Korean government indicted Mr. Lee and Dongbuk's site manager, Mr. Kwang-Pung Noh, for giving approximately $13,000 in bribes to COR Song, and COR Song for receiving those bribes. Additionally, it indicted Mr. Lee for fraud, forging and falsifying electrician, HVAC mechanic, and plumbing licenses to appear to comply with the PWS of the contract at issue here. The ROK investigation found that Dongbuk performed substandard work under the contract and HVAC equipment was damaged as a result in an amount exceeding one million United States dollars. (R4, tab 30)

On 30 June 2011, the United States Army Suspension and Debarment Official formally notified Dongbuk and Mr. Lee of their suspensions "from contracting USFK-wide with the Executive Branch of the United States Government," pending completion of an investigation into fraud and bribery committed by Dongbuk during performance of the contract (R4, tab 33). When a member of the Defense Criminal Investigative Service and an inspector from the Korean National Tax Service hand-delivered the suspension letter to Mr. Lee on 5 July 2011, Mr. Lee stated: the reason Dongbuk submitted inflated invoices for reimbursable material costs was to cover the losses Dongbuk incurred performing the contract; he knew what he did was wrong, but he needed to recover his losses; he paid COR Song $13,000 in bribe money; he had under-bid the contract; and providing Class I licensed technicians "was very expensive." (R4, tab 34)

On 28 September 2011, a Korean criminal court convicted Mr. Lee of four counts of fraud against the U.S. government (R4, tab 49). A translation of the court documents sets forth the "FACTS OF THE CRIMES" as follows:

> A. Exercise of forged document: On 2008.7.28, at Dongbuk R&U Engineering's office located at 978-10, Bangabe-dong, Seocho-gu, Seoul, Lee was preparing bidding proposal for Osan Air Base officer's family quarter management contract. Lee found out that he could not fulfill the contract's requirements, to have first class technician in electricity, air

conditioning, machinery, and plumbing. So, he forged second class plumber Hong Woo Han's license and second class electricity technician Nak Seon Paek's license to first class license and sent copies of the licenses to contract manager of Osan Air Base officer's family quarter.

B. Violation of national technician qualification law: In 2008.8, U.S. contract manager requested additional documents as evidence to prove that Dongbuk R&U Engineering had been hiring first class air conditioning technician. Lee decided to borrow license from a technician. Lee borrowed first class air conditioning technician license from Byeong Hoon Chung and paid him money in return.

C. Fraud: When signing contract with U.S. Air Force, it was confirmed that the U.S. forces pay for expenses spent for officer's family quarter management contract. (In case of purchasing light bulbs, electric appliances, and machine parts for this contract, the U.S. Air Force agreed to pay for the expenses, as requested by Dongbuk R&U Engineering.) However, after confirming that U.S. Air Force did not check the requested price, Lee decided to inflate the price and make requests. From 2009.1 to 2011.4, as shown in attached crime table, Lee inflated price and swindled ₩59,151,796 ($59,152 USD) from contract manager of U.S. Air Force, including the occasion of swindling ₩431,050 ($431 USD) in 2009.1. Lee used the method of falsely making receipts with blank receipt paper. He inflated ₩2,400 ($2.4 USD) light bulb to ₩4,800 ($4.8 USD) when making such request.

D. Providing bribe: In 2009, at Seoulok, a restaurant located in Seojeong-dong, Pyeongtaek-si, Gyeonggi-do, Lee provided Song ₩ 2,000,000 ($2,000 USD).... In 2009, at Seoulok, Lee provided Song ₩ 2,000,000 ($2,000 USD). In 2010, at public parking lot in front of New Metro Hotel located in Seojeong-dong, Pyeongtaek-si, Gyeonggi-do, Lee provided Song ₩ 2,000,000 ($2,000 USD). In 2010.7, at a coffee shop located in New Metro Hotel, Lee provided Song two million KRW. Between 2009.2 and 2010.7, Lee provided Song ₩13,000,000 ($13,000 USD) over six occasions.

(R4, tab 49 at 2-3, tab 51) The Korean criminal court ordered Mr. Lee to pay the U.S. ₩59,151,796 ($59,151.79 USD) and sentenced him to one year in prison, which was deferred for a two-year period and would not be required if he "stays clean" during the period (i.e., was not in further criminal trouble) (R4, tab 49 at 2, tab 51).

On the same date, 28 September 2011, a Korean criminal court convicted COR Song of receiving bribes from Dongbuk to ignore inflated costs on invoices it submitted under the contract (R4, tabs 49, 51). The court sentenced COR Song to pay a fine of about $7,000 and another fine of about $13,000, and if he did not pay the latter, he would be placed in jail to perform labor calculated at $50 a day (*id.*).

On 12 October 2011, the Air Force Audit Agency issued a Summary of Audit Results finding Dongbuk overcharged the U.S. about $145,026.38 for the period of contract performance between October 2008 and May 2011 (R4, tab 52 at 1, tab 57). The Audit Agency did not include the months of June, July and August 2011 in its audit summary because the government withheld payment from Dongbuk for those months pending legal action (R4, tab 52 at 1 n.1, tab 57).

In November of 2011, based on Mr. Lee's convictions for forgery, bribery and fraud in connection with the contract, U.S. Air Forces Korea notified Dongbuk and Mr. Lee of their proposed debarment (R4, tab 55). The following month, the government issued a debarment decision letter to both Dongbuk and Mr. Lee debarring them from contracting with the Executive Branch of the United States government for five years due to "egregious misconduct" (R4, tab 58).

During April of 2012, Dongbuk submitted to the CO a claim for payment of ₩186,325,196 (about $159,252.00) for invoices it had submitted for performance of the contract during the months of June, July and August 2011, which was certified by Mr. Lee (R4, tab 59; Compl. ¶ 1). On 29 August 2012, based on lack of receipt of a final CO decision, Dongbuk filed this appeal with the Board. Dongbuk filed its complaint in this appeal during September of 2012 and one month later the government filed its answer asserting the affirmative defense of fraud.

DECISION

Based upon the "Appellant's President's criminal conviction for submitting forged technicians' licenses" to "deceptively procure the award of the Contract," the government moves for summary judgment upon the ground of fraud. According to the government, "[g]iven this fraud ab initio, the Board lacks subject matter jurisdiction over the subject appeal" to recover "payment for services rendered related to the Project for the period from June to August 2011." (Gov't SJM at 1; Compl. ¶ 1) Appellant contends that there are issues of material fact in dispute that preclude us from granting summary judgment (App. Opp'n at 1-4; App. Sur-reply at 1-2).

In this appeal, the government acknowledges it solicited proposals to perform maintenance services at Osan Air Base and "awarded" a contract for such services to Dongbuk. The government, however, challenges the contract's existence based upon "fraud" committed by Dongbuk unknown to the government at time of the award. While the government contends subject matter jurisdiction is lacking before this Board because there was no enforceable contract, "the law is clear that, [for us] to have jurisdiction, a valid contract must only be pleaded, not ultimately proven." *Total Medical Mgmt., Inc. v. United States*, 104 F.3d 1314, 1319 (Fed. Cir.), *cert. denied,* 522 U.S. 857 (1997); *accord Engage Learning, Inc. v. Salazar,* 660 F.3d 1346, 1353 (Fed. Cir. 2011); *Lewis v. United States*, 70 F.3d 597, 602, 604 (Fed. Cir. 1995); *Gould, Inc. v. United States*, 67 F.3d 925, 929-30 (Fed. Cir. 1995). Dongbuk has made a non-frivolous assertion of an express contract to perform services. The government's contention – that fraud by Dongbuk resulted in the contract being *void* – is a challenge to the "truth" of the allegation there was a contract entered into, rather than to the "sufficiency" of the allegation of a contract. *Tele-Consulants, Inc.,* ASBCA No. 58129, 13 BCA ¶ 35,234 at 172,993; *American General Trading & Contracting, WLL*, ASBCA No. 56758, 12-1 BCA ¶ 34,905 at 171,640. Such a challenge is not amenable to resolution under a motion to dismiss for lack of jurisdiction. Rather, it must be treated as a motion for failure to "state a claim on which relief can be granted." *E.g., Total Medical Mgmt.*, 104 F.3d at 1319, 1321; *Gould*, 67 F.3d at 929-30. Resolution of the latter requires we "assume jurisdiction" to decide whether the complaint contains allegations that, if proven, would be sufficient to entitle a party to relief, as well as to "determine issues of fact arising in the controversy." *See Gould*, 67 F.3d at 929-30; *Spruill v. Merit Systems Protection Board*, 978 F.2d 679, 688 (Fed. Cir. 1992); *Do-Well Mach. Shop, Inc. v. United States*, 870 F.2d 637, 639-40 (Fed. Cir. 1989). Thus, the issue presented by the government's motion is whether Dongbuk can prove a necessary element of the cause of action for which it seeks relief , i.e., the existence of a government contract. *See, e.g., Spruill,* 978 F.2d at 688; *Cedars-Sinai Medical Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993), *cert. denied,* 512 U.S. 1235 (1994); *E.M. Scott & Assocs.,* ASBCA No. 45869, 94-3 BCA ¶ 27,059 at 134,837. Here, however, since the parties rely on matters outside the pleadings, the government's motion is properly treated as one for summary judgment. *See, e.g.*, FED. R. CIV. P. 12(d).

The standards set forth in FED. R. CIV. P. 56 guide us in resolving the motion for summary judgment here, which relies upon the Rule 4 file, Korean court documents, and other evidence. *J.W. Creech, Inc.*, ASBCA Nos. 45317, 45454, 94-1 BCA ¶ 26,459 at 131,661; *Allied Repair Service, Inc.*, ASBCA No. 26619, 82-1 BCA ¶ 15,785 at 78,162-63. We will grant a summary judgment motion only if pleadings, depositions, interrogatory answers, and admissions on file, together with any affidavits or other evidence, show there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. The party seeking summary judgment has the burden of demonstrating both elements. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Mingus Constructors, Inc. v.*

United States, 812 F.2d 1387, 1890 (Fed. Cir. 1987); *Comptech Corp.*, ASBCA No. 55526, 08-2 BCA ¶ 33,982 at 168,082.

The government asserts here that Dongbuk submitted forged technician licenses to "deceptively procure the award of the Contract" and thus the services contract awarded is void. It is well established that when one party to a contract induces the other party to enter into an agreement through fraud or misrepresentation, the contract is void *ab initio*. *Long Island Savings Bank, FSB v. United States,* 503 F.3d 1234, 1246 (Fed. Cir. 2007), *cert. denied,* 555 U.S. 812 (2008); *J.E.T.S., Inc. v. United States*, 838 F.2d 1196, 1197, 1200 (Fed. Cir.), *cert. denied*, 486 U.S. 1057 (1988); *Francisco Garcia Gutierrez*, ASBCA No. 42984, 92-1 BCA ¶ 24,633 at 122,919. As the Court of Appeals for the Federal Circuit explained in *J.E.T.S.*:

> The contract...was procured by and therefore permeated with fraud.... J.E.T.S. obtained this contract by knowingly falsely stating that it was a small business. Had it stated the truth..., it would not have received the contract. A government contract thus tainted from its inception by fraud is void *ab initio*, like the government contracts held void because similarly tainted by a prohibited conflict of interest in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520...(1961) and *K & R Eng'g Co. v. United States*, 616 F.2d 469, 222 Ct. Cl. 340 (1980).

J.E.T.S., 838 F.2d at 1200; *accord Long Island Savings Bank,* 503 F.3d at 1246.

To prove that a government contract is "tainted from its inception by fraud" and thus "void *ab initio*," the government must show the contractor (a) obtained the contract by (b) knowingly (c) making a false statement. *Long Island Savings Bank,* 503 F.3d at 1246; *accord C&D Construction, Inc.*, ASBCA No. 38661, 90-3 BCA ¶ 23,256 at 116,683. The government presents evidence that Dongbuk's CEO was convicted by a Korean court of forging Class II Plumber Hong Woo Han's license and Class II Electricity Technician Nak Seon Paek's license to a Class I license and sending copies of those forged licenses to the government's CO. It also presents evidence that Dongbuk's CEO additionally was convicted of "borrowing" a Class I Air Conditioning license from Byeong Hoon Chung in exchange for the payment of money when the government's CO advised such a license should be furnished with a revised proposal to prove the hiring of a Class I Air Conditioning Technician. Dongbuk does not dispute here that these acts occurred or that its CEO was convicted of crimes by a Korean court for having committed these acts. Rather, it admits appellant's "act of forging the technicians' licenses" was "improper" and states simply it was trying "to meet the Government's specification which was rather unrealistic and over-burdensome." (App. Opp'n at 1)

According to appellant, "the Government's requirement that certain technicians hold Class I licenses was unrealistic and over burdensome" (App. Opp'n at 3; App. Sur-reply at 2). While appellant appears to suggest the CO could and should have waived the Class I requirement, in *Prestex, Inc. v. United States*, 162 Ct. Cl. 620, 624, 320 F.2d 367, 371 (1963), the Court of Claims explained the Comptroller General repeatedly has held that a specification deviation in a contractor's proposal affecting price, quality or quantity offered is a major deviation which cannot be waived. 39 Comp. Gen. 570 (1960); 36 Comp. Gen. 251 (1956); 30 Comp. Gen. 179 (1950). The effect of statutes and regulations pertaining to the letting of public contracts is that the contract awarded must be the contract advertised and, if not, the government is not bound because its contracting agent cannot bind the government beyond his or her actual authority. The rejection of nonresponsive bids is necessary if the purposes of the competitive procurement are to be attained, that is, to give everyone an equal right to compete for Government business, to secure fair prices, and to prevent fraud. *Prestex*, 162 Ct. Cl. at 625-26, 320 F.2d at 371-72.

Dongbuk's CEO acknowledges the service provided by a "real" Class I technician would have been "very expensive" (R4, tab 34; *accord* App. Opp'n at 4). Dongbuk adds that, because of fierce competition, it did not have the "luxury" of submitting a contract price it thought was reasonable for performance of the specified work (App. Sur-reply at 2). In sum, the government has shown here that Dongbuk obtained the contract, through a knowing material misrepresentation, planning to provide Class II service cheaper than that advertised for, without the knowledge of other bidders, actual or potential, to the other bidders' unquestioned disadvantage, and to the detriment of the federal government and its procurement system. *See, e.g.*, *Prestex*, 162 Ct. Cl. at 627, 320 F.2d at 372.

A nonmoving party need not present its entire case in response to a summary judgment motion to defeat that motion, but it must present sufficient evidence to show evidentiary conflicts exist on the record as to "material" facts at issue. *Armco, Inc. v. Cyclops Corp.*, 791 F.2d 147, 149 (Fed. Cir. 1986); *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 835-36 (Fed. Cir. 1984). A nonmoving party may not simply rest upon vague allegations of disputed facts in opposing such a motion. "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine issue for trial." *Penn Screw & Machine Works, Inc.*, ASBCA No. 32382, 89-3 BCA ¶ 22,205 at 111,694.

Dongbuk suggested after briefing of the government's motion concluded that it needed discovery to address disputed questions of "material" fact. It promulgated 12 production requests, which seek documents relating to the performance of two contracts awarded subsequently for MFH maintenance services at Osan Air Base. (App. Request for Information and Production of Documents) It also requested by email of 14 March 2013 that this Board defer ruling on the summary judgment motion until "the Board has been provided with information and documents from the Government."

A party opposing a summary judgment motion, such as Dongbuk, may request a tribunal delay ruling on the motion in order to obtain additional discovery without which "it cannot present facts essential to justify its opposition." *Baron Services, Inc. v. Media Weather Innovations LLC*, 2013 U.S. App. LEXIS 9242 (Fed. Cir. 2013). Trial courts should grant such requests "when the party opposing the [summary judgment] motion has been unable to obtain responses to his discovery requests" and the discovery sought is essential to opposing summary judgment and "relevant to the issues presented by the motion for summary judgment." *Id.* (citing *Snook v. Trust Co. of Ga. Bank of Savannah, N.A.*, 859 F.2d 865, 870 (11th Cir. 1998)). Rule 56 of the Federal Rules of Civil Procedure (previously 56(f), now 56(d)) requires that a nonmoving party state, by affidavit, the reasons why discovery is needed in order to support its opposition to a summary judgment motion. *Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386, 1389 (Fed. Cir. 1989); *see Celotex*, 477 U.S. at 326 (Rule 56(f) provides nonmovants with protection from being "railroaded" by premature summary judgment motions); *Dunkin' Donuts of America, Inc. v. Metallurgical Exoproducts Corp.*, 840 F.2d 917, 919 (Fed. Cir. 1988) (premature grant of summary judgment contrary to Rule 56(f)). Thus, if discovery is reasonably directed to "facts essential to justify the party's opposition," in the words of Rule 56(f), discovery must be permitted or summary judgment refused. *Opryland USA Inc. v. Great Am. Music Show, Inc.*, 970 F.2d 847, 852 (Fed. Cir. 1992).

Dongbuk has not set forth here, by affidavit or otherwise, how documents relating to the performance of two subsequent service contracts are relevant to the narrow issue presented here – whether Dongbuk can prove existence of a government contract, a necessary element of the cause of action for which it seeks relief. The terms and administration of two subsequent contracts have no bearing upon whether the contract awarded to Dongbuk was void as a result of acts committed by Dongbuk in procuring award of the contract. In sum, the discovery sought by Dongbuk is not reasonably directed to any "facts essential to justify [its] opposition" to the motion here. One purpose of the summary judgment procedure is to save the parties and the trial tribunal the time and cost that may be wasted in pursuit of irrelevant facts by discovery. Having made no showing as to the need for the discovery, in an unpublished order dated 26 April 2013, we denied Dongbuk's request to defer ruling upon the summary judgment motion pending its discovery. *See, e.g., New Am. Shipbuilders, Inc. v. United States*, 871 F.2d 1077, 1081 (Fed. Cir. 1989); *Keebler Co.*, 866 F.2d at 1388-90.

Based on the evidence presented and cited in response to the government's motion, and drawing all reasonable inferences in favor of Dongbuk, the nonmovant, we conclude that the agreement which was entered into between Dongbuk and the government did not result in a valid contract due to Dongbuk's knowing misrepresentation of its employee licenses and governmental reliance on Dongbuk's misrepresentations, and was void *ab initio*. *See Long Island Savings Bank,* 503 F.3d at 1246; *C&D Construction*, 90-3 BCA ¶ 23,256 at 116,683. Dongbuk has set forth no affirmative evidence that would allow a reasonable fact finder to conclude otherwise. *See Anderson v. Liberty Lobby, Inc.*,

477 U.S. 242, 248 (1986) (issues of fact are genuine for summary judgment purposes only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party"); *Opryland USA,* 970 F.2d at 849-50 (a fact is "material" if it may affect the outcome, i.e., the finding of that fact is relevant and necessary to the proceeding); *see also Long Island Savings Bank,* 503 F.3d at 1251.

Citing the debarment and Korean court action, Dongbuk asserts that both it and its CEO have suffered and received sufficient punishment for their actions (App. Sur-reply at 2-3). According to Dongbuk, "[t]he Government is trying not to pay [it] for the work performed on the basis [it] committed fraud on the Government by failure to provide Class I licensed technicians" and presumably should not be allowed to avoid paying Dongbuk for the work it performed (*id.* at 2). Although there is authority for compensating a party to a contract subsequently found illegal for work it performed based on a theory of unjust enrichment, *e.g.*, *United States v. Amdahl Corp.*, 786 F.2d 387, 395 (Fed. Cir. 1986); *Eaton Corp.*, ASBCA No. 38386, 91-1 BCA ¶ 23,398 at 117,403, there is no indication in any of those decisions that the contractor engaged in bribery, fraud or other corrupt practices to obtain the contract at issue. *K&R Eng'g Co. v. United States*, 616 F.2d 469, 475, 222 Ct. Cl. at 353; *Schuepferling GmbH & Co., KG*, ASBCA No. 45564, 98-1 BCA ¶ 29,659 at 146,953. Here, Dongbuk engaged in fraud to obtain the award. The alleged rights it seeks to enforce (payment for work performed) spring directly from the contract, which is illegal and fraudulent. No tribunal of law will lend its assistance to carry out the terms of an illegally obtained contract. *Atlantic Contracting Co. v. United States*, 57 Ct. Cl. 185, 196 (1922). The fact that the government received some benefit does not relieve Dongbuk from the consequences of its fraud. When one has been guilty of fraud, one cannot recover in any form of action. *Id.* at 197 (citing *Dermott v. Jones*, 69 U.S. 1, 9 (1865)); *see K&R Eng'g Co.,* 616 F.2d at 475, 222 Ct. Cl. at 353.

CONCLUSION

Appellant cannot establish a necessary element of the cause of action on which it seeks relief, i.e., the existence of a government contract. The contract was void *ab initio.* Accordingly, we grant the government's motion for summary judgment and deny the appeal.

Dated: 13 August 2013

Terrence S. Hartman

TERRENCE S. HARTMAN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

JACK DELMAN
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 58300, Appeal of Dongbuk R&U Engineering Co., Ltd., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals