ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
ERKA Construction Co., Ltd.	)	ASBCA No. 57618
	)	
Under Contract No. W91GF5-07-M-4004	)	

APPEARANCE FOR THE APPELLANT: Paul D. Reinsdorf, Esq.
Frankfurt, Germany

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Bernal Rodriguez, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION
OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

This timely appeal arises from the contracting officer's (CO) 28 February 2011 final decision asserting a $495,360 claim against ERKA Construction Co., Ltd. (ERKA) for the cost of approximately 3,200 gallons of government fuel per day allegedly stolen by ERKA at Joint Base Balad (JBB), Iraq, from 6 May to 5 September 2009.

Respondent moved to dismiss the appeal on the grounds that ERKA did not submit, and the CO did not decide, a certified claim for an alleged $294,000 in offset or mitigation costs, and so the Board lacks jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, to entertain the appeal, or for summary judgment on its affirmative defense of fraud based on ERKA's admission that it stole government fuel. (Gov't mot. at 1-2) ERKA opposed both motions.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. Effective 15 February 2007, the Regional Contracting Center (RCC) of the Joint Contracting Command-Iraq/Afghanistan, awarded Contract No. W91GF5-07-M-4004 (the contract) to ERKA at a $1,659,600.00 firm fixed-price for the base year to provide "BURN PIT SERVICES" at JBB in accordance with a 12 February 2007 Performance Work Statement (PWS) and ERKA's 25 January 2007 proposal (R4, tab 1 at 1, 3).

2. The contract's PWS provided in pertinent part:

> **2.4 PLACE OF PERFORMANCE**: The principle [sic] place of performance is the LSA Anaconda Burn Pit....
>
> ....
>
> **3.2 Burning Operation**....
>
> ....
>
> 3.2.4. Contractor shall execute burn pit operations such that areas that are renewable i.e. when a pit or area fills with ash, new garbage is diverted to a new burn area while the previous area(s) are remediated.
>
> ....
>
> 3.2.6. Contractor shall remediate burn pit residue (Ash) such that metal and other non burnable is [sic] separated and sorted for inclusion into the metal removal operation.
>
> 3.2.7. Ash is disposed of by removing from LSAA and transporting to a certified landfill.
>
> ....
>
> **3.4 Concrete Crushing**....
>
> 3.4.1. Contractor shall collect all discarded concrete at the work site into a collection point for COR inspection.
>
> ....
>
> 3.4.3. Contractor shall crush all concrete on site into 1" or less sized pieces of usable aggregate.
>
> ....

> 3.4.5. Aggregate shall remain the property of the U.S. government. The location, disposition, and removal of the aggregate shall be coordinated and directed by the COR.

(R4, tab 1 at 23-26)

3. The contract provided:

> **13.27 Fuel.** Contractors with operational offices and who reside on the installation are authorized bulk and retail fuel provided at the Government Fuel point. Fuel provided by the Government must be for official use only in support of this contract. Contractors who make deliveries to the installation are not authorized fuel. Contractors are not authorized to transport bulk fuel provided by the Government off of the installation unless the contract is for the transport of bulk fuel. Contract prices must be appropriately adjusted for the provision of fuel by the Government. Contractors who are suspected of fraud waste or abuse with regard to fuel will be investigated by appropriate authorities.

(R4, tab 1 at 14) ERKA was authorized to receive fuel under this provision.

4. The contract included a 15 February 2007 to 14 February 2008 base year, and four option periods each of six months (R4, tab 1 at 22). Effective 14 February 2008 bilateral Modification No. P00001 revised the base period to 1 March 2007 through 29 February 2008, with the four option periods following consecutively thereafter and ending 28 February 2010 (R4, tab 2).

5. Respondent exercised option periods 1, 2 and 3, ending 31 August 2009, by Modification Nos. P00002, P00006 and P00009 (R4, tabs 3, 8, 11). Bilateral Modification No. P00011, effective 31 August 2009, extended the CLIN 0004 option three period by one month for 0004AA screening and inspection, by two months for 0004AB burning, and by six months each for 0004AC concrete crushing and 0004AD metal removal (R4, tab 13).

6. According to a redacted government investigative report, between 1 July 2007 and 5 May 2009 ERKA withdrew an average of 3,700 gallons of diesel fuel per day from the government's bulk fuels, and from 6 May to 4 August 2009 withdrew an average of 6,800 to 7,000 gallons of such fuel per day (R4, tab 20 at 2 of 5).

7. The government's investigative report stated, and ERKA denies: Since June of 2009 ERKA parked a tanker truck on the elevated hillside inside the burn pit to ensure the fuel would flow, and refueled 28 modified trucks each day with 1,000 or 2,000 liters of fuel (R4, tab 20 at 1 of 5, ¶ 2-27). ERKA's fuel tank operator kept a ledger of each truck he refueled (R4, tab 20 at 2 of 5, ¶ 2-51). The modified trucks that departed JBB were met by teams equipped with portable pumps and hoses by which they siphoned fuel out of the modified trucks into barrels and drove the fuel to various locations (R4, tab 20 at 2 of 5, ¶ 2-53). At ERKA's JBB worksite the government found a chart showing that individuals named "Hakeem," "Mustafa," and "Haider" [sic, actually "Ganim"] received 66,062 gallons of fuel from 27 July through 4 August 2009 and at ERKA's burn pit office, notes show charges of approximately $100 U.S. dollars per subcontractor vehicle refueled there (R4, tab 20 at 3 of 5, ¶¶ 2-73, 2-76, tab 21, attachs. 2, 5).

8. ERKA invoiced other base contractors, Piril Co., Rawaan Co., Rawaa-Al Co., Serka and Gurkan Co., for fuel service from 30 November 2008 to 31 July 2009 (R4, tab 20 at 3 of 5, tab 21, attach. 3).

9. The 21 January 2010 letter of MAJ Jack L. Nemceff II, Commander RCC-Balad, to Erdal Kamisli, ERKA's managing director, demanded $1,955,153.54 for the cost of U.S. Government fuel during the period of December 2008 to 5 September 2009 "that ERKA employees stole [from JBB] using specially modified dump trucks that had fake fuel tanks installed. Your failure to have proper controls in place is the proximate cause of this loss to the U.S. Government." (R4, tab 14)

10. The 28 January 2010 emails of ERKA's attorney Paul Reinsdorf to RCC-Balad objected to payment of the $1,955,153.54 MAJ Nemceff demanded and requested various documents under the Freedom of Information Act (R4, tabs 16, 17).

11. On 4 April 2010 RCC-Balad provided the government investigative report with several attachments to Mr. Reinsdorf (R4, tabs 20-22).

12. Mr. Reinsdorf's 8 April 2010 letter to RCC-Balad stated that upon review of the government's information concerning fuel theft at JBB, "my client agrees to reimburse the Government for the unauthorized fuel requisitions" on the following terms:

I. Quantum

> In order to quantify the Government's maximum loss we used the following parameters:
>
> 1) On 6 May 2009, the improper requisitioning commenced. This is the date upon which ERKA's level of

requisitioning began to increase.... [T]his increase resulted from the COR's direction calling for ERKA to remove the accumulated gravel, soil and ashes ("Debris") offsite.... Based on this direction, ERKA engaged three local trucking subcontractors to remove the debris.

2) On 5 September 2009, the improper requisitioning terminated....

3) The daily average fuel consumption prior to [6 May 2009] was 3,700 gallons of diesel fuel....

4) ...The cost to the Government for the diesel is approximately .30 cent per liter or $1.13 (.3 x 3.785) per gallon....

5) ERKA removed an average...of 6,900 gallons of diesel fuel each day during the...improper requisitioning....

6) The difference between the [foregoing] daily averages of fuel requisitioning is 3,200 (6900 – 3700) gallons.

7) The average daily loss to the Government is therefore $3,616 [3,200 gallons x $1.13 per gallon].

8) The loss period...reflect[ed] 4 months...at 30 days per month for a total of 120 days....

9) The loss amount is therefore a maximum amount of $433,920 (120 x $3,616).

II. Mitigation

The maximum loss amount of $433,920 is mitigated by the following circumstances:

1) ERKA paid its hauling subcontractors to dump the Debris off base in kind, meaning the subcontractors received fuel in exchange for the hauling services instead of cash payments. The hauling work was performed at the direction of the COR and under his watch....

2) ...The Government received the benefit of this removal and hauling work for which a modification should have been issued....

3) The cost for paying a hauling subcontractor, to include overhead and profit for ERKA, to come on site, load the Debris and then unload it off site is approximately $175.00 per haul. This amount includes the cost of fuel to transport the Debris....

4) During the period at issue ERKA sponsored between 10 to 18 vehicles per day.... Taking an average from these figures means that approximately 14 trucks entered the site per day to perform hauling services. Therefore during the 120 day period a total of 1,680 entries were made for hauling purposes.

5) The Government therefore received a benefit in the amount of $294,000 [1,680 x $175].

Mr. Reinsdorf concluded that ERKA was prepared to reimburse the government "$142,252 (433,920 – 298,900)."[1] The letter was not certified pursuant to the CDA. (R4, tab 24 at 1-4)

13. Mr. Reinsdorf's 17 August 2010 letter to RCC recomputed the government's maximum loss at $495,360 (120 days x 3,200 gal./day x $1.29/gal.) and submitted more documents regarding ERKA's removal of debris from JBB (R4, tab 27).

14. The 30 October 2010 memorandum to ERKA from RCC CO, Capt Katrina Curtis USAF, accepted ERKA's proposed $495,360 quantum amount and with respect to ERKA's proposed "mitigation" stated:

> Based upon [SOW ¶ 3.4.5], it is within the authority of the [COR] to request that Erka remove aggregate to an off-site area, whether that area was on-base or off-base. Therefore, if the COR directed the removal of the aggregate to an off-site area, no modification of the contract was necessary, due to its inclusion in the original contract. However, on 26 Oct 2010, the COR, who was responsible for the contract at the time this

[1] The difference between $294,000 and $298,900 is not explained, and the difference between $433,920 and $298,900 (or $294,000) is not $142,252.

> issue arose, stated explicitly that he neither directed Erka to remove the aggregate off-base nor had any knowledge that Erka was doing so. Instead, he stated that the aggregate was not to be removed off-site, but was to be leveled across the entire site to reduce the visibility of the mounds. Therefore, if Erka did indeed remove any USG owned aggregate to an off-base location, it was done on its own behest, and the USG should not be held responsible for compensating Erka for its own actions.

(App. supp. R4, tab 7)

15. CO Curtis' 28 February 2011 memorandum for ERKA demanded $495,360.00, rejected the mitigation described in ERKA's 8 April 2010 and 17 August 2010 letters, stated that it was the final decision of the CO and advised ERKA of its appeal rights (R4, tab 30). On 13 May 2011 ERKA timely appealed that final decision to the ASBCA, which was docketed as ASBCA No. 57618.

16. Mr. Tayfun Kirac, ERKA's project manager for the burn pit contract from March to September 2009, stated:

> 6) In the beginning of April 2009 SGT Hunt, the COR on the contract, directed me to remove the accumulated debris from the burn pit to an off-base location. I then applied for dumping permits with the local Iraqi municipality and provided the permits to both SGT Hunt and the [CO].
>
> 7) I then made arrangements for Iraqi subcontractors to bring their trucks on base for the purpose of removing the debris. In order to obtain authorization for these trucks to enter the base the following mandatory procedures were followed:
>
> a) Apply for and receive an authorizing memorandum from the [CO] for the trucks to enter the base. The attached application and memorandum from June 2006 shows how this process functioned....
> b) Upon receiving the approved memorandum, present the memorandum to the Badge Office.
> c) The Badge Office would then issue temporary badges for each truck and driver. The badges would then be provided to the South Gate entrance office for truck entrance.
> d) The badges were valid for 15 days only and had to be renewed every 15 days.

e) The Military Police then escorted the trucks to the burn pit....

8) We commenced removing the debris off base in late April 2009. Approximately 10 to 16 trucks entered the base each day for this purpose....

9) Approximately 200 tons...of debris were removed per day from the burn-pit.... The debris was removed to the dump site authorized under the dumping permit.

10) The Government was informed by ERKA that fuel was being provided to the truckers in exchange for removing debris from the burn pit....

....

14) Some of the other contractors located on the Base did not have a fuel truck and needed to refuel their equipment. They had authority to requisition fuel. In order to refuel their equipment the contractors rented our truck and driver. The fuel truck was taken to the Fuel Point, where the contractors signed for the fuel being requisitioned. They then used the truck to refuel their equipment located on the base. Erka charged these contractors a rental fee for this service, which is noted as "Fuel Service" on Erka's invoices.

(App. supp. R4, tab 5, Declaration dated April 18, 2012, submitted in opposition to the motions)

17. ERKA's complaint set forth the following counts:

Count I

(Unsubstantiated Demand)

19. Appellant denies that its employees improperly requisitioned fuel from the Government Fuel Point.

20. The fuel receipts provided by Respondent show an average daily requisitioning amount during the Loss Period of 1,186 gallons. This daily amount is lower than the average

daily amount of 3,700 gallons requisitioned prior to the Loss Period.

21. Respondent's demand is therefore not substantiated, since the average fule [sic] requisitioning during the loss period is actually lower than the amount requisitioned prior thereto.

Count II

(Directed Change)

22. Appellant alleges in the alternative that Respondent directed that the manner of storing the accumulated debris, consisting of crushed stones and dirt produced from the crushing operations, be changed from on-site to off-site storage. No provision of the Contract required Appellant to remove this debris off site.

23. On or about 10 March 2009, the Contractor [sic] Officer's Representative directed Appellant to remove the accumulated debris from the base...because there was insufficient space for the mounds of debris piling up on the base.

24. Appellant engaged three local subcontractors to remove the debris from the base to a site approved by the Iraqi authorities off-site. Appellant presented the dumping permit from the local municipal authorities to Respondent.

25. The subcontractors were allowed access to the base and their presence was readily apparent.

26. Respondent was aware of the presence of the local subcontractors and did not object to the removal by them of the accumulated debris.

27. Respondent issued memoranda authorizing the trucks of the subcontractors to obtain fuel from the Government Fuel Point. These memoranda were presented to the Badging Office, which in turn issued stickers to place in the trucks. The stickers contained identifying information on the trucks,

which had Iraqi license plates. With the stickers, the trucks were authorized to requisition fuel.

28. To the extent an increase in fuel requisitioning in fact took place, it occurred both as a result of Respondent's direction to remove the significant amount of accumulated debris from the base to an offsite location and Respondent's facilitating this removal by authorizing the trucks to requisition fuel.

POSITIONS OF THE PARTIES

Movant asserts that (1) ERKA's 8 April 2010 letter to the CO stated that the amount the CO demanded should be reduced because the government directed ERKA to perform extra work which required extra fuel; ERKA's subcontractor loaded debris on site and unloaded it offsite at $175 per haul, including fuel cost; that for an average of 14 trucks for 120 days, there were 1,680 entries which produced $294,000 (1,680 x $175); ERKA never submitted a certified claim for $294,000 to the CO, but rather "an informal offset to the Government's demand," and so "the CDA does not confer jurisdiction over [ERKA's] appeal," citing *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010) (gov't mot. at 8-9, 13; Bd. corr. ltr. dtd 19 June 2012 at 2-3) and (2) respondent's affirmative fraud defense is based on its assertion that ERKA "committed fraud by...providing fuel to other base contractors and subcontractors in dump trucks that contained modified fuel tanks;" the Board must grant it summary judgment on the appeal "as against public policy" because its affirmative defense is "based on conclusive evidence that fraud was perpetrated by a contractor" and ERKA "has admitted that it stole fuel" which is "conclusive evidence that fraud was committed" (gov't mot. at 14-16).

ERKA argues that both motions should be denied. (1) ERKA timely appealed from the government's $495,360 affirmative claim over which the Board plainly has jurisdiction. ERKA did not allege in its complaint any "claim" or "offset" based upon entitlement to $294,000 in costs of alleged extra work performed at the government's direction. The $294,000 was mentioned in ERKA's 8 April 2010 letter submitted during the course of negotiations. (2) ERKA did not defraud the government. It did not sell fuel to other base operators in exchange for money, but rather it obtained government fuel for vehicles used to remove debris from the JBB work site and rented its fuel tanker to other contractors in exchange for payment of a rental fee. Its subcontractors removed debris from the work area at the behest and under the direction and control of government officials, and such debris removal was "for official use only in support of this contract." There has been no adjudication of fraud by ERKA under this contract. (App. opp'n at 1-2, 9, 11)

On 20 June 2012 respondent clarified that it only moves to dismiss ERKA's $294,000 mitigation/setoff issue, not the appeal in its entirety (Bd. corr. ltr. dtd. 20 June 2012).

DECISION

I.

We analyze respondent's motion to dismiss in terms of a motion to strike Count II, ¶¶ 22-28, of ERKA's complaint. *See Joiner Systems, Inc.*, ASBCA No. 57097, 11-2 BCA ¶ 34,782 at 171,181, 171,184 n.1 (motions to dismiss not the entire appeal but only portions of the complaint are treated as motions to strike).

For a contractor claim the CDA requires that: (1) the contractor must submit the demand in writing to the CO, (2) the contractor must submit the demand as a matter of right, and (3) the demand must contain a sum certain. *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995). The claim must request, expressly or implicitly, a final decision of the CO, who must issue a decision thereon, or fail to decide the claim within the prescribed time. *See James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1542-43 n.4 (Fed. Cir. 1996) If the contractor's claim exceeds $100,000, it must be certified. *See* 41 U.S.C. § 7103(b)(1).

ERKA's 8 April 2010 letter to respondent did not constitute a CDA claim, because it did not request a CO's decision, expressly or impliedly, and the $294,000 it mentioned was not certified (SOF ¶ 12). Moreover, ERKA has conceded: "In sum, the Complaint contains no allegations or even remote references to a contractor claim for set off in the amount of $294,000. Appellant has not otherwise asserted a claim against the Government for the stated amount." (App. opp'n at 12)

Having concluded that ERKA did not submit a CDA claim with respect to its Count II, we now turn to whether we have jurisdiction to consider Count II as a defense. When a motion to strike an opponent's allegations in a pleading asserts that the tribunal has no CDA jurisdiction to entertain a defense raised by such allegations, as here, the criteria are whether the challenged allegations constitute a CDA claim that seeks a contract modification, *see M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1331 (Fed. Cir. 2010), or allege a common law defense that requires no such modification, *see Sikorsky Aircraft Corp. v. United States*, 102 Fed. Cl. 38, 48 n.14 (2011) (court had jurisdiction where Sikorsky alleged affirmative defenses of accord and satisfaction, waiver, laches and statute of limitations).

In *Maropakis* the contracting officer's final decision demanded $303,550 in liquidated damages (LD) for 467 days of delay. The contractor's sole defense was that it

requested a 447-day excusable delay extension. The court affirmed the Court of Federal Claims' dismissal of Maropakis' defense because its 22 July 2002 "claim" letter did not give the CO adequate notice of the total number of days extension requested, state a sum certain and request a final decision, nor was it certified. 609 F.3d at 1329. The court rejected Maropakis' argument that the CDA requirements did not apply to its time extension defense against the government's LD assessment in the following terms:

> The statutory language of the CDA is explicit in requiring a contractor to make a valid claim to the contracting officer prior to litigating that claim. The purpose of this requirement is to encourage the resolution of disagreements at the contracting officer level thereby saving both parties the expense of litigation. [Citations omitted.] Maropakis does not point to any authority that provides an exception to the CDA claim requirement when a contractor's claim for contract modification is made in defense to a government claim. And we see no reason to create such an exception. Thus, we hold that a contractor seeking an adjustment of contract terms must meet the jurisdictional requirements and procedural prerequisites of the CDA, whether asserting the claim against the government as an affirmative claim or as a defense to a government action.

609 F.3d at 1331.

ERKA seeks to distinguish *Maropakis* on the basis that it has not asserted a monetary demand or affirmative defense against the government's demand for $495,360 to reimburse it for allegedly stolen government fuel (app. opp'n at 9, 11-12). ERKA styled its Count II "(Directed Change)." Such styling comported with its 8 April 2010 assertions that the COR's direction for ERKA to remove accumulated debris from the job site was "removal and hauling work for which a modification should have been issued," was work not required by any contract provision and was valued at $294,000 or $298,900 (SOF ¶ 12).

Extra work directed by the government is a constructive change, which entitles a contractor to a contract adjustment. We conclude that ERKA's proffered distinction is disingenuous; it tacitly admits that its mitigation defense is controlled by *Maropakis*. We further conclude that ERKA's Count II allegations, viewed individually and conjunctively, describe the factual grounds ("directed change") for a contract modification and hence must be stricken for lack of jurisdiction. Accordingly, we grant respondent's motion and strike Count II and ¶¶ 22-28 from ERKA's complaint without prejudice to ERKA's right to submit a CDA claim for Count II.

II.

Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

We turn first to movant's argument that this appeal must be denied, or "dismissed" as respondent erroneously states (gov't mot. at 14), because its affirmative defense of fraud is based on evidence that ERKA perpetrated a fraud and ERKA has admitted that it stole fuel, which is conclusive evidence that fraud was committed (*id.* at 15-16).

The government's answer, Part III, "AFFIRMATIVE DEFENSE – FRAUD," has five paragraphs alleging that ERKA stole fuel from JBB, and detailing techniques and estimated quantities (gov't answer at 20-21).

Pleading an affirmative defense of fraud, *per se*, does not require the Board to dismiss, rather than to decide, an appeal. *Environmental Systems, Inc.*, ASBCA No. 53283, 03-1 BCA ¶ 32,167 at 159,053, *aff'd on recon.*, 03-1 BCA ¶ 32,242, held that we have jurisdiction to decide whether the contractor breached the contract by submitting false progress payment requests and was subject to default termination therefor. We applied that rationale in *AAA Engineering & Drafting, Inc.*, ASBCA No. 47940 *et al.*, 01-1 BCA ¶ 31,256 at 154,366, where there was no evidence of fraud in the inception of the contract, but evidence of fraud perpetrated during its performance. In *AAA* we cited *Anlagen-und Sanierungstechnik GmbH*, ASBCA No. 37878, 91-3 BCA ¶ 24,128 at 120,753, where we rejected the contention that because the contractor's termination claim was fraudulent, we had no jurisdiction of the appeal, and held: "We clearly have jurisdiction under the [CDA]...to decide the dispute concerning appellant's entitlement to termination costs.... That fraud may have been practiced in the course of negotiations for settlement of those costs...does not deprive us of jurisdiction under the CDA." Thus, in this appeal we clearly have CDA jurisdiction to decide respondent's claim for the cost of allegedly stolen fuel.

On the merits, the cases movant cites with respect to a fraud defense are readily distinguishable from this appeal. We denied each of those appeals on the basis of a court conviction of the contractor or its officers of fraud. Here, there has been no court adjudication that ERKA has perpetrated a fraud. In *AAA Engineering*, 01-1 BCA ¶ 31,256 at 154,367-68, we denied the appeal based on "conclusive evidence of fraud perpetrated during...performance" of the contract based on a U.S. District Court judgment of false claim damages against AAA under 31 U.S.C. § 3729. In *National Roofing and Painting Corp., U.S. Fidelity & Guaranty Co.*, ASBCA Nos. 36551, 37714, 90-2 BCA ¶ 22,936 at 115,131-34, we denied the appeal in ASBCA No. 36551 based on the U.S. District Court's conviction of the contractor's officers of conspiracy to defraud, fraud and bribery (and

dismissed ASBCA No. 37714 for lack of privity with the contractor's surety). In *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), we denied the appeal on the ground that the contract was voidable if not void 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. In *Techno Engineering & Construction, Ltd.*, ASBCA No. 47471, 94-3 BCA ¶ 27,109 at 135,117, we denied the appeal based on the U.S. District Court's conviction of the appellant and its president of submitting false certified payroll forms under the contract subject of the appeal.

We turn to the criteria for summary judgment. With respect to the first criterion – no genuine issues of material fact – the parties' allegations and supporting evidence of why ERKA's diesel fuel withdrawals from the government's bulk fuel point at JBB may have increased by about 3,200 gallons daily from 6 May through 5 September 2009 (SOF ¶¶ 6-7, 9, 12, 14), differ markedly. Based on fuel usage data and other evidence, movant contends that ERKA "stole" 3,200 daily gallons of fuel, and cites its investigation report to describe ERKA's methods and procedures for such theft (SOF ¶¶ 6-9). ERKA denies movant's proposed material facts derived from its investigation report, specifically its "UNDISPUTED MATERIAL FACTS" ¶¶ 4-12, 15-16, 27, 29 and 33 alleging such methods and procedures for stealing fuel (app. opp'n at 2-8). ERKA asserts that it used increased fuel from 6 May through 5 September 2009 to haul accumulated debris from the burn pit, which the COR, SGT Hunt, ordered in early April 2009, and to provide fuel for other base contractors to refuel their equipments, and submitted the declaration of Mr. Kirac, its project manager during such period, in support of its contentions (SOF ¶ 16). Since the foregoing facts are material and vigorously disputed, it is inappropriate to grant summary judgment to movant.

CONCLUSION

We grant respondent's motion to strike Count II of the complaint for lack of CDA jurisdiction. We deny respondent's motion for summary judgment as to the remainder of the appeal.

Dated: 16 August 2012

DAVID W. JAMES, JR.
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

EUNICE W. THOMAS
Administrative Judge
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. 57618, Appeal of ERKA Construction Co., Ltd., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals