ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
International Oil Trading Company	)	ASBCA Nos. 57491, 57492, 57493
	)	
Under Contract Nos. SPO600-07-D-0483	)	
SPO600-09-D-0515	)	

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN ON APPELLANT'S MOTION TO STRIKE

Our decision of 22 June 2012 in the captioned appeals sustained in part a motion for summary judgment by International Oil Trading Company (IOTC) on various contract interpretation issues. Familiarity with that decision and the statement of facts therein is presumed. *See International Oil Trading Company,* ASBCA Nos. 57491, 57492, 12-2 BCA ¶ 35,104. On 27 July 2012, the government submitted an amended Answer that included among other things the following affirmative defense:

FIRST DEFENSE

> IOTC's fraud and bribery in connection with obtaining the two contracts at issue is an affirmative defense against IOTC's claim for fuel losses. Specifically, in 2007, IOTC principals bribed Gen. Mohammad Dahabi (also known as "Pasha"), then head of the General Intelligence Directorate, the Jordanian equivalent of the CIA, with $9 million to assure that IOTC would not have effective competition for the contracts. The contracts were obtained by and are tainted by

bribery and fraud, and hence are *void ab initio* and IOTC cannot recover on its claims.

IOTC moves to strike the "First Defense" on the grounds that it requires a determination that IOTC committed a violation of the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. § 78dd-1, and that this determination is expressly excluded from our jurisdiction by subsections 7103(a)(5) and 7103(c)(1) of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 7101 *et seq.* The government contends that the cited provisions of the CDA do not apply to an affirmative defense that the contract at issue is *void ab initio* under common law for taint of fraud and bribery in its formation. We agree with the government.

Subsection 7103(a)(5) of the CDA states in pertinent part: "The authority of this subsection...does not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine." The contracting officer's final decision (COFD) at issue in these appeals denied IOTC's claims for additional compensation from the government allegedly due under the contract. Neither the COFD nor the government's first defense in its amended Answer claims any penalty or forfeiture prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine. There is no penalty or forfeiture imposed by a finding that a contract never came into existence.

Section 7103(c)(1) of the CDA states in pertinent part: "This section does not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud." Neither the COFD nor the government's first defense in its amended Answer settle, compromise, pay, or otherwise adjust any IOTC claim involving fraud. They deny the IOTC claims entirely. The Board is not an "agency head," as defined by the CDA. 41 U.S.C. § 7101(3). Moreover, since the enactment of the CDA, the Board's authority to decide appeals is statutory and not derived by a delegation of authority from an agency head. 41 U.S.C. § 7105(e)(1)(A).

IOTC argues that the only possible basis for the affirmative defense for taint of bribery and fraud in the formation of the contracts is a violation of the FCPA for which the Department of Justice is specifically authorized by statute to administer, settle, or determine. We disagree. A government contract is *void ab initio* under the common law for taint of fraud, bribery or other misconduct compromising the integrity of the Federal contracting process, without a criminal conviction. *See United States v. Acme Process Equipment Co.,* 385 U.S. 138, 146-48 (1966); *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 563-67 (1961); *Long Island Savings Bank, FSB v. United States*, 503 F.3d 1234, 1244-46 (Fed. Cir. 2007); *Servicios y Obras Isetan S.L.,* ASBCA No. 57584, 13 BCA ¶ 35,279 at 173,161. Our finding in *MOQA-AQYOL JV LTD,* ASBCA No. 57963, 13 BCA ¶ 35,285, decided in the same month as *Servicios*, does not support IOTC's position in the present appeals. In *MOQA*, the government sought to disqualify appellant's legal

representative in the appeal for an alleged violation of a statute prohibiting his representation. The alleged misconduct in *MOQA* did not occur in the formation of the contract and provided no basis for finding the contract *void ab initio* under common law. Nor was there any allegation by either party that such was the case.

Additionally, IOTC's reliance upon *Martin J. Simko Construction, Inc. v. United States*, 852 F.2d 540 (Fed. Cir. 1988), is misplaced. *Simko* held that government counter claims for fraud in the United States Court of Federal Claims were not subject to the CDA's requirement for a contracting officer's final decision. It did not involve a BCA's consideration of whether the formation of CDA contracts that are the subject of claims before it are tainted by fraud, bribery or other wrongdoing and are therefore void. *See Godley v. United States*, 5 F.3d 1473 (Fed. Cir. 1993) (requiring a determination whether a CDA contract is *void ab initio* due to fraud).

In *United Technologies Corp., Pratt & Whitney Group, Government Engines and Space Propulsion*, ASBCA No. 46880 *et al.*, 95-2 BCA ¶ 27,644, the contractor claimed damages for government cancellation of its engine contracts, and moved for summary judgment on the government's affirmative defense that the contracts were tainted by a violation of a conflict-of-interest statute with respect to their award. Citing *Mississippi Valley Generating,* we held that we had jurisdiction to decide the merits of the government's affirmative defense and denied the motion. 95-2 BCA ¶ 27,644 at 137,804-05.

In *Environmental Safety Consultants, Inc.,* ASBCA No. 53485, 02-2 BCA ¶ 31,904, the contractor moved to dismiss the government's affirmative defense of fraud in the contractor's claim for additional costs of performance. We denied the motion on the grounds that:

> That fraud allegedly may have been practiced in the preparation and submission of claims does not deprive the Board of jurisdiction under the CDA. The allegation of fraud in this appeal is not a Government claim asserted as the Government's own right, but a response which raises a defense to appellant's claim for a quantum recovery. The Government's defense places in issue the amount of out-of-pocket expenses and legal obligations to appellant's subcontractors, suppliers, employees or others that could constitute recoverable costs. Thus it is plainly relevant to the merits of appellant's claim and within the jurisdiction of the Board. [Citations omitted]

Id. at 157,613.

In our decision in *Environmental Systems, Inc.*, ASBCA No. 53283, 03-1 BCA ¶ 32,167, we held that we lacked jurisdiction over allegations that closely tracked the provisions of the False Claims Act, 31 U.S.C. § 3729, and concluded with an allegation that the contractor had "filed false claims." However, in the same appeal, we also held that we had jurisdiction over other allegations that the submission of false progress payment requests was a material breach of contract justifying the default termination. *Id.* at 159,053.

The government's first affirmative defense in the present appeals does not track the provisions of the FCPA or any other criminal statute, nor does it claim any money damages, forfeiture or penalties from IOTC. The affirmative defense states only that the contracts under which IOTC is claiming money damages from the government are *void ab initio* for taint of fraud and bribery by IOTC in obtaining and retaining the contracts. IOTC argues that the government has failed to allege any causal connection between the alleged bribery/fraud and the formation of Contract No. 0483. We do not agree. The first affirmative defense alleges that the $9 million bribe was "to assure that IOTC would not have effective competition for the contracts." More specifically, the record shows that there is record evidence that Jordanian transit permits (LOAs) were required for performance of the contracts, that IOTC was consciously working to see that it was the only organization to receive the LOAs, and that the allegations of bribery in IOTC's effort to restrict the competition are not frivolous. (*See* Government's Surreply to Appellant's Reply to the Government's Opposition to Appellant's Motion for Partial Summary Judgment on Count I, dated 4 November 2011, exs. 9-12)

The motion to strike is denied.

Dated: 19 August 2013

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

MARK A. MELNICK
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 Nos. 57491, 57492, 57493, Appeals of International Oil Trading Company, rendered in conformance with the Board's Charter.

Dated:

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