

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
International Oil Trading Company	)	ASBCA Nos. 57491, 57492, 57493
	)	
Under Contract Nos. SP0600-09-D-0515	)	
SP0600-07-D-0483	)	

APPEARANCES FOR THE APPELLANT:

Christopher M. Kise, Esq.
Melissa B. Coffey, Esq.
Foley & Lardner, LLP
Tallahassee, FL

Ronald H. Uscher, Esq.
Donald A. Tobin, Esq.
Peckar & Abramson, P.C.
Washington, DC

APPEARANCES FOR THE GOVERNMENT:

Daniel K. Poling, Esq.
DLA Chief Trial Attorney
Howard M. Kaufer, Esq.
David R. Nolte, Esq.
Kathryn M. Kelley, Esq.
Trial Attorneys
DLA Energy
Fort Belvoir, VA

OPINION BY ADMINISTRATIVE JUDGE MELNICK ON APPELLANT'S MOTION
FOR PARTIAL JUDGEMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE
RENEWED MOTION TO STRIKE THE GOVERNMENTS FIRST AFFIRMATIVE
DEFENSE

International Oil Trading Company (IOTC) seeks partial judgment on the pleadings or, in the alternative, renews its motion to strike the government's first affirmative defense. That defense alleges that IOTC obtained the contracts identified above through fraud or bribery. It contends they are therefore void *ab initio*. The Board has already denied a request from IOTC to strike the defense for lack of jurisdiction. In this new motion, IOTC contends that the subsequent decision of the United States Court of Appeals for the Federal Circuit in *Laguna Construction Co. v. Carter*, 828 F.3d 1364 (Fed. Cir. 2016), abrogates that prior ruling. The new motion is denied.

BACKGROUND

IOTC has appealed from the denial of claims for fuel delivered to the government in Iraq under two contracts. Previously, the Board granted IOTC partial summary judgment. *International Oil Trading Co.*, ASBCA No. 57491 *et al.*, 12-2 BCA ¶ 35,104, *amended by* 14-1 BCA ¶ 35,593. The government then advanced its first affirmative defense, alleging that IOTC principals bribed the head of a Jordanian intelligence agency “to assure that IOTC would not have effective competition for the contracts.” The government maintained that “[t]he contracts were obtained by and tainted by bribery and fraud, and hence are *void ab initio* and IOTC cannot recover on its claims.” IOTC moved to strike the government’s defense, suggesting that the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, which excludes from the Board’s jurisdiction consideration of fraud-related claims, barred the Board from entertaining the government’s defense. In a decision issued 19 August, 2013, the Board disagreed, concluding that the Board’s statutory bar to considering fraud claims did not extend to an affirmative defense that the contract is void *ab initio* under the common law for taint of fraud or bribery in its formation. *International Oil Trading Co.*, ASBCA No. 57491 *et al.*, 13 BCA ¶ 35,393. IOTC now contends that *Laguna* abrogates the Board’s prior ruling by forbidding the Board from deciding the facts relevant to the defense.

DECISION

As observed in the Board’s opinion denying IOTC’s motion to strike the defense, “[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.” *International Oil Trading Co.*, 13 BCA ¶ 35,393 at 173,658; *see also Godfrey v. United States*, 5 F.3d 1473, 1475 (Fed. Cir. 1993) (“In general, a Government contract tainted by fraud or wrong-doing is void *ab initio*”). IOTC cannot prevail if the contracts at issue are void *ab initio*. *See Dongbuk R&U Eng’g Co.*, ASBCA No. 58300, 13 BCA ¶ 35,389 at 173,639. IOTC suggests that *Laguna* “recalibrated the legal landscape,” requiring any determination that fraud or bribery induced the award of a contract be issued “by an outside tribunal” (app. mot. at 5-6). IOTC contends there are no pending judicial decisions where such findings have or could be made (*id.* at 3).

Laguna sought payment before the Board of contract vouchers. Separately, senior *Laguna* officials pled guilty in district court to kickback schemes with its subcontractors, including conspiracy to defraud the United States. Accordingly, the government advanced before the Board an affirmative defense based upon fraud, which the Board found meritorious. *Laguna*, 828 F.3d at 1366-67. The court of appeals affirmed, confirming the Board’s jurisdiction over the fraud defense. *Id.* at 1368-73. The court observed that “[c]ertain fraud-related claims are outside of the Board’s jurisdiction.” They include “claims relating to 41 U.S.C. § 7103 (formerly 41 U.S.C. § 604), 28 U.S.C. § 2514 (Special Plea in

Fraud) and 31 U.S.C. §§ 3729-31 (False Claims Act).” However, the court held that the government’s affirmative defense of prior material breach premised upon fraudulent conduct “does not fall into any of these categories.” *Laguna*, 828 F.3d at 1368. Furthermore, though the Board lacked jurisdiction over the Anti-Kickback Act claim brought by the government against Laguna’s officials, the court commented approvingly about the Board’s prior practice of entertaining a defense arising from such a claim when it does not have to find facts about the fraud. *Id.* at 1368-69.

Contrary to IOTC’s suggestion, *Laguna* did not purport to recalibrate the legal landscape and abrogate the Board’s prior ruling here permitting the government’s affirmative defense to proceed. *Laguna* said nothing to restrict the Board’s power to determine the validity of a contract when the government alleges that it is void *ab initio* due to fraud or bribery in its acquisition.* *Laguna* acknowledged “the Supreme Court’s instruction that the government must be able to ‘rid itself’ of contracts that are ‘tainted’ by fraud, including kickbacks and violations of conflict-of-interest statutes.” *Laguna*, 828 F.3d at 1371 (citing *United States v. Acme Process Equip. Co.*, 385 U.S. 138 (1966); *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 563 (1961)). The Board has already held in this appeal that its contract jurisdiction includes determining such issues. *International Oil Trading Co.*, 13 BCA ¶ 35,393 at 173,658-59.

Indeed, the Board has previously rejected IOTC’s current argument. In *ABS Development Corp.*, ASBCA Nos. 60022, 60023, 17-1 BCA ¶ 36,842, the government sought to amend its answers and assert the same affirmative defense it maintains here, that the contract “was obtained by and is tainted by fraud, and hence is void *ab initio*.” As here, the appellant argued *Laguna* deprived the Board of jurisdiction to entertain such a defense because “no third party has made factual determinations regarding any alleged fraud.” The Board observed that *Laguna* had found that “certain fraud-related *claims* are outside of the Board’s jurisdiction.” Ruling in favor of jurisdiction, the Board concluded that:

There is a big difference between whether a contract is void *ab initio* (in which the question is whether the contractor can establish that he has a contract with the government in the first place, see *Atlas International Trading Corp.*, ASBCA No. 59091, 15-1 BCA ¶ 35,830 at 175,198 (contract obtained through bribery void *ab initio*)), and whether (as in *Laguna*)

* Among *Laguna*’s citations is *Turner Construction Co. v. General Services Administration*, GSBCA No. 15502 *et al.*, 05-2 BCA ¶ 33,118. *Laguna* characterized that decision as rejecting a prior material breach claim that would require a finding of fraudulent conduct. *Laguna*’s reliance upon it does not extend its holding to forbid the Board from determining whether a contract is void *ab initio* due to fraud.

the government is asserting the type of fraud claim that we do not possess jurisdiction to entertain.

ABS Dev. Corp., 17-1 BCA ¶ 36,842 at 179,520.

The Board decisions IOTC claims support its contention about *Laguna* do not do so. *Kellogg Brown & Root Services, Inc.*, ASBCA No. 57530, 16-1 BCA ¶ 36,554, held that *Laguna* does not require the suspension of a Board appeal pending resolution of a related fraud case in district court. It did not address the Board's power to declare contracts void *ab initio*. The Board's reconsideration decision in *Supreme Foodservice GmbH*, ASBCA No. 57884 *et al.*, 17-1 BCA ¶ 36,740 at 179,091, rejected the suggestion that the Board had ignored a previous criminal fraud claim against the contractor in district court, observing that the Board did not intend to relitigate that matter or make determinations of fraud. The Board did not depart from its initial conclusion that it may rule upon a defense that the contract is void *ab initio* due to fraud in the inducement. See *Supreme Foodservice GmbH*, ASBCA No. 57884 *et al.*, 16-1 BCA ¶ 36,387 at 177,385-86. Another of IOTC's citations, *Public Warehousing Co., K.S.C.*, ASBCA No. 59020, 17-1 BCA ¶ 36,630, granted a limited stay of the Board's proceedings for the pursuit of a criminal fraud case in district court. Still another, *L.C. Gaskins Construction Co.*, ASBCA No. 58550 *et al.*, 17-1 BCA ¶ 36,780 at 179,284, acknowledged the Board's power to determine whether a contract is void *ab initio* due to material misrepresentation. Neither of the last two decisions discussed *Laguna*.

Finally, the appellant in *Supply & Service Team GmbH*, ASBCA No. 59630, 17-1 BCA ¶ 36,678, sought reimbursement of government offsets taken after the contractor had allegedly submitted invoices for services not provided, or that were inflated. The government advanced an affirmative defense that the Board characterized as material breach based upon fraud. Citing *Laguna*, the Board found the defense unsustainable without a third-party factual determination. The decision did not address the Board's power to declare contracts void *ab initio*.

CONCLUSION

IOTC has failed to demonstrate that *Laguna* abrogates the Board's prior denial of its motion to strike the government's first affirmative defense, or holds that the Board may not decide it. Accordingly, the motion is denied.

Dated: 12 January 2018



MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
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 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