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The ASBCA's Fraud Jurisdiction

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The Armed Services Board of Contract Appeals ("ASBCA") recently held that it has jurisdiction to determine whether a contractor bribed a high-ranking official of the Government of Jordan in an effort to obtain a Defense Logistics Agency fuel supply contract. *International Oil Trading Company*, ASBCA Nos. 57491 *et al*, 2018-1 BCA ¶ 36,985. The ASBCA took jurisdiction despite the fact that the allegation, if proven, would likely be a violation of the Foreign Corrupt Practices Act of 1977 ("FCPA"), 15 U.S.C. §§ 78dd *et seq*., which the ASBCA does not have authority to enforce. This article will first discuss the theory or "hook" the ASBCA used to extend its jurisdiction to include the fraud related issues. The article will then review the case law concerning the Boards of Contract Appeals' jurisdiction to make their own factual determination of fraud, as opposed to relying upon findings of fraud made by a court of competent jurisdiction.

The ASBCA's Jurisdiction and Affirmative Defenses of Fraud

The ASBCA's fraud jurisdiction turns on the distinction between an affirmative claim of fraud and an affirmative defense of fraud. The ASBCA does not have Contract Disputes Act ("CDA") jurisdiction over an affirmative Government claim that a contractor committed fraud. 41 U.S.C. §7103(c)(1); *Martin J. Simko Constr. v. United States*, 852 F.2d 540 (Fed. Cir. 1988). But if a contractor is before the ASBCA on an unrelated issue, the ASBCA will take jurisdiction over a Government affirmative defense of fraud (even though the Board would not otherwise have jurisdiction over the underlying fraud actions). When the Government asserts an affirmative defense of fraud, the Government does not request that the ASBCA determine that the contractor violated a specific fraud statute. Rather, the Government alleges that the underlying facts are common law fraud.

How Is Fraud To Be Determined?

An affirmative defense of fraud necessarily requires a factual determination that a contractor did or did not commit the alleged fraud. But what tribunal has the jurisdiction to make such findings? As discussed below, the ASBCA's answer depends on when the alleged fraud occurred, *i.e*. during the formation of the contract, or during contract performance. Notably, the ASBCA has held that its jurisdiction is far more extensive for fraud occurring prior to contract award than for fraud occurring after contract award.

When the Government asserts an affirmative defense that a contract is void *ab initio* due to fraud occurring **during contract formation** (fraud in the inducement), the ASBCA has held that it can make the necessary factual findings of fraud itself. *See, e.g., Int'l Oil Trading Co.*, ASBCA Nos. 57491 *et al.*, 18-1 BCA ¶ 36,985 (Jan. 12, 2018); *ABS Dev. Corp.*, ASBCA Nos. 60022, 60023, 17-1 BCA ¶ 36,842 (Aug. 30, 2017); *Supreme Foodservice GmbH*, ASBCA Nos. 57884 et al., 16-1 BCA ¶ 36,387 at 177,385-386 (Mar. 17, 2016), *recon. denied* 17-1 BCA ¶ 36,740 (Apr. 27, 2017); *Servicious y Obras Isetan S.I.*, ASBCA No. 57584, 13 BCA ¶ 35,279 at 173,162 (Apr. 5, 2013). The ASBCA has held evidentiary hearings to make such findings of

fraud since 1990. *Schuepferling, Gmbh & Co., KG*, ASBCA Nos. 45564, *et al.*, 98-1 BCA ¶ 29,659 (Mar. 23, 1998); *ORC, Inc.*, ASBCA No. 49693, 97-1 BCA ¶ 28,750 (Dec. 30, 1996); *C & D Constr., Inc.*, ASBCA No. 38661, 90-3 BCA ¶ 23,256 (Aug. 20, 1990).

The ASBCA applies a different jurisdictional standard when the Government asserts an affirmative defense alleging that fraud occurred **during contract performance**. The ASBCA has consistently held that it cannot make the factual determination of fraud occurring during contract performance. Rather, the ASBCA must rely upon factual findings of fraud made by a third-party tribunal, such as a federal court. *Supply & Service Team GmbH*, ASBCA No. 59630, 17-1 BCA ¶ 36,678 (Mar. 1, 2017); *ERKA Constr. Co., Ltd.*, ASBCA No. 57618, 12-2 BCA ¶ 35,129 (Aug. 16, 2012); *AAA Eng'g & Drafting, Inc.*, ASBCA No. 48729, 01-1 BCA ¶ 31,256 (Jan. 18, 2001).

The Federal Circuit's *Laguna* Decision

In *Laguna Construction Company, Inc. v. Carter*, 828 F.3d 1364, 1368 (Fed. Cir. 2016), the Federal Circuit reviewed the extent of the ASBCA's jurisdiction over a Government affirmative defense of fraud. Laguna appealed to the ASBCA from the contracting officer's denial of its $2.8 million claim for unpaid invoices. The Government asserted an affirmative defense of "first material breach." The Government alleged that Laguna materially breached the contract by submitting invoices inflated by illegal subcontractor kickbacks, thereby excusing the Government's subsequent refusal to pay the invoices. The Government's affirmative defense relied solely upon the criminal convictions of several company officers.

The Federal Circuit first held that the Contract Disputes Act did not preclude the ASBCA from taking jurisdiction over an affirmative defense of first material breach, even though the alleged breach involved fraud over which the ASBCA normally does not have jurisdiction. The court emphasized, however, that the ASBCA cannot make the factual determination of the underlying fraud itself:

> Further, in cases such as this, where the Board does not have jurisdiction over the underlying fraud actions—here an Anti-Kickback Act claim—the Board has determined that it can maintain jurisdiction over a separate affirmative defense involving that fraud as long as it does not have to make factual determinations of the underlying fraud. *See, e.g., Appeals of AAA Eng'g & Drafting, Inc.*, ASBCA No. 48729, 01-1 BCA ¶ 31,256; *Turner Constr. Co. v. Gen. Servs. Admin.*, GSBCA No. 15502, 05-2 BCA ¶ 33,118. (Parentheticals omitted.)

828 F.3d at 1368.

The court concluded that the ASBCA properly exercised jurisdiction because it relied upon findings of fraud made by a court of competent jurisdiction, rather than making its own findings of fraud. *Id*. at 1368-69. The court cited to two earlier ASBCA and General Services Administration Board of Contract Appeals ("GSBCA," since consolidated into the Civilian Board of Contract Appeals) decisions holding that a Board can take jurisdiction over an affirmative defense of fraud so long as the Board does not make the underlying factual determination of fraud. *Id.* In *AAA Engineering & Drafting, Inc.*, the ASBCA held that it had jurisdiction over a Government affirmative defense alleging fraud during the administration of a contract, because the Tenth Circuit had already determined that the contractor had committed the fraud in question. Similarly, in *Turner Construction*, the GSBCA held that it did not have jurisdiction over a Government affirmative defense of prior material breach

that had not been otherwise adjudicated, because that affirmative defense would have required the CBCA to make its own determinations of fraud.

The Federal Circuit's *Laguna* decision focused solely upon the nature of the underlying fraud actions, emphasizing that if the ASBCA did not otherwise have jurisdiction over the underlying fraud actions, it could not make the factual determination of the underlying fraud itself. The court did not limit its holding to Government affirmative defenses alleging fraud during contract performance. The *Laguna* decision does not suggest that the Federal Circuit would have reached a different conclusion if the underlying fraud actions had occurred during contract formation.

Post-*Laguna* ASBCA Decisions

Several recent ASBCA decisions have addressed the *Laguna* precedent and the scope of the Board's fraud jurisdiction. In *Supply & Service Team GmbH*, ASBCA No. 59630, 17-1 BCA ¶ 36,678 (Mar. 1, 2017), *recon. denied* 17-1 BCA ¶ 36,742 (May 3, 2017), the Government asserted an affirmative defense (first material breach) based upon the submission of false invoices during performance. Unlike *Laguna*, however, there was no determination of the underlying fraud by a court of competent jurisdiction. Accordingly, the ASBCA held that "[t]he government's fraud defense is not viable due to lack of factual findings by outside tribunals." *Id.* at 178,602. In reaching this conclusion, the Board relied upon the *Laguna* decision:

> But *Laguna* carries within it the reason that the Army cannot prevail here. As the Federal Circuit noted, although we do not possess jurisdiction over the fraud actions that may underlie an affirmative defense of fraud, we only "maintain jurisdiction over an affirmative defense involving that fraud as long as [we do not] have to make factual determinations of the underlying fraud." In *Laguna* the underlying fraud was proved by the criminal convictions of the company's officers . . . (Citations omitted.)

Id. at 178,601.

The Government had contended that *Laguna* did not apply, because the remedy sought by the Government in *Supply & Service Team* differed from the remedy sought in *Laguna*. The Board dismissed this argument as "a distinction without a difference. The decision in *Laguna* was based upon the fraudulent nature of the submitted invoices, not the scope of the remedy sought by the government." *Id.* at 178,602. The ASBCA's *Supply & Service Team* decision drew no distinction between fraud during contract performance and fraud during contract formation.

In two more recent decisions, however, the ASBCA has declined to apply the Federal Circuit's *Laguna* precedent and its own *Supply & Service Team* precedent to a Government affirmative defense that a contract is void *ab initio* due to fraud occurring during its formation. *International Oil Trading Co.*, ASBCA Nos. 57491 *et al.*, 18-1 BCA ¶ 36,985 (Jan. 12, 2018); *ABS Dev. Corp.*, ASBCA Nos. 60022, 60023, 17-1 BCA ¶ 36,842 (Aug. 30, 2017). Both appellants relied upon the *Laguna* and *Supply & Service Team* precedents and argued that the Government's affirmative fraud defense was not viable due to the lack of factual findings made by outside tribunals. The ASBCA held that *Laguna* and *Supply & Service Team* did not control because those decisions did not involve a Government affirmative defense that the contract was void *ab initio* due to fraud in the inducement. The Board, however, did not explain how fraud occurring during contract formation differs from fraud occurring during performance and how that difference, if any, affected the extent of the ASBCA's fraud jurisdiction, nor did it attempt to reconcile the fact that the Federal Circuit's holding in *Laguna* made no such distinction.

The *International Oil* and *ABS* decisions both observed that the ASBCA can declare contracts void *ab initio* due to fraud in the inducement. However, those decisions do not address the underlying question: Where does the ASBCA get the jurisdiction to make the factual findings necessary to establish the alleged fraud in the inducement? The authors of the *International Oil* and *ABS* decisions simply assumed that, because the ASBCA has the power to declare a contract void *ab initio*, it automatically has jurisdiction to make the factual determinations necessary to establish the fraud defense – even though it would not otherwise have jurisdiction over the underlying fraud actions.

The *International Oil* decision is an example of the practical complications resulting from the ASBCA's application of different jurisdictional standards to Government affirmative defenses of fraud. Because the Government asserted that a bribe occurred **prior to contract award**, the ASBCA took jurisdiction to determine whether such a bribe occurred. The parties engaged in several years of discovery, which involved numerous motions and the production of well over a million pages of documents. The matter was settled at the end of document discovery. However, if the litigation had continued, there would have been numerous depositions, a fact-finding hearing (or Cross Motions for Summary Judgment) and a written decision on the merits of the Government's affirmative defense.

By contrast, if the Government had asserted that the bribe in question had occurred **during contract performance**, the ASBCA would not have jurisdiction to determine whether a bribe occurred. In that case there would be no discovery, no fact-finding hearing, and no written decision as to whether the alleged fraud occurred. The ASBCA could adjudicate the Government's affirmative defense only a fraud determination had been made previously by court of competent jurisdiction.

Conclusion

The ASBCA's *International Oil* and *ABS* decisions limit the scope of the Federal Circuit's *Laguna* decision, while maximizing the Board's jurisdiction over Government affirmative fraud defenses. The result is an application of two very different jurisdictional standards. If an alleged fraud occurs ***before*** contract award and the Government asserts that the contract is void *ab initio*, the ASBCA takes the position that it has jurisdiction to make the factual determination of the underlying fraud itself. If, however, the alleged fraud occurs ***after*** contract award, the ASBCA's position is that it does not have jurisdiction to make the factual determination of the underlying fraud itself. It must rely upon a factual determination of fraud made by a court of competent jurisdiction.

The ASBCA's post-*Laguna* decisions do not explain why its jurisdiction over fraud in the inducement is more extensive that its jurisdiction over fraud occurring during contract performance. Until this issue is clarified, either at the ASBCA or the Federal Circuit, contractors need to be aware of the differing ASBCA jurisdictional standards when confronted with a Government affirmative defense of fraud.

When False Claims Cause Contractual Damages: Pursuing Parallel Qui Tam and Breach Claims, and the Public Disclosure Conundrum

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This article concerns a unique quandary in the realm of government contracts—what must government contractors consider when, on the one hand, the government contractor seeks information from the Government to support its breach of contract action against the Government or one of the government contractor's contracting partners, and, on the other hand, the government contractor also desires to bring a qui tam action against the contracting partner for violations of the False Claims Act?

A typical qui tam action brought under the False Claims Act ("FCA") involves a person, known as a "relator," who directly observes his or her employer or other closely related entity submitting false or fraudulent claims for payment to the government ("false claims"). *See* 31 U.S.C. § 3730(b). The relator may bring an action on behalf of the United States for violations of the FCA and recover up to 30 percent of the proceeds resulting from the action (plus attorney's fees, costs, and expenses) if successful. *See id*.

But consider the scenario where, in preparing for litigation with the Government or a contracting partner on a project, a federal contractor learns of false claims submitted by the contracting partner (for example an Architect/Engineer, subcontractor, or service provider with or without whom the contractor has privity (other "parties")). Where false claims of another party are discovered, a contractor may be incentivized to pursue a qui tam action against the other party in an effort to collect a percentage of damages as permitted by the FCA. In pursuit of both the underlying cause of action and the potential qui tam action, contractors must carefully navigate the collection of documentation pertaining to the opposing party's contract via the Freedom of Information Act ("FOIA"), by requesting an Office of Inspector General ("OIG") investigation, or communications with another Federal agency, while avoiding triggering the FCA's jurisdictional bars.

The current FCA contains two main jurisdictional bars designed to delineate the fine line between encouraging whistle-blowing and discouraging "parasitic" relators who would bring FCA suits based on information publicly disclosed, if that relator did not discover the information of its own accord. *See* 31 U.S.C. § 3730(e); *See United States* ex rel. *Rost v. Pfizer, Inc.*, 507 F.3d 720, 727 (1st Cir. 2007) (internal citations omitted). These jurisdictional considerations are commonly known as the "public disclosure bar" and the "original source exception," respectively.

Public Disclosure Bar

The FCA bars qui tam actions that contain substantially the same allegations or transactions that have been previously disclosed to the public through listed sources, including information disclosed via federal agency report, hearing, audit, or investigation. *See* 31 U.S.C. § 3730(e)(4)(A).

Despite a deep Circuit split, the majority view after the 2010 amendment to the Patient Protection and Affordable Care Act is that a "public disclosure" requires some act of disclosure to the public outside of the government. Thus, mere Government knowledge of the information does not trigger the public disclosure bar. *See United States* ex rel. *Wilson v. Graham Cnty. Soil & Water Conservation Dist.*, 777 F.3d 691, 697 (4th Cir. 2015) (noting that public disclosure does not mean simply "landing on a DOJ lawyer's desk"). To bar jurisdiction of a FCA claim, public disclosure must also "reveal both the misrepresented state of facts and the true state of facts," even

if from different sources, so that an inference of fraud may be drawn. *United States* ex rel. *Ondis v. City of Woonsocket*, 587 F.3d 49, 54 (1st Cir. 2009).

Accordingly, a contractor requesting information or investigative assistance from federal agencies in pursuit of evidence for a breach of contract claim against one of its contracting partners may inadvertently cause the allegation or transactions underlying a potential qui tam action to be publicly disclosed. For example, written responses and documents produced by a Government agency under a FOIA request are deemed "reports" subject to the FCA's public disclosure bar. *See Schindler Elevator Corp. v. United States* ex rel. *Kirk*, 563 U.S. 401 (2011). Thus, to the extent the elements supporting a qui tam action have been disclosed in response to a FOIA request or Government production of documents, the qui tam action would be dismissed for lack of jurisdiction under the public disclosure bar.

Confidential disclosures to the OIG may trigger an investigation, and Government investigators may disclose confidential information to the public while conducting their investigation. While the FCA does not bar jurisdiction over qui tam actions based on disclosures made confidentially to the Government, it may bar qui tam actions if the Government subsequently disseminates those disclosures to the public. *See Rost*, 507 F.3d at 729. At least one Circuit has determined that information was publicly disclosed when conveyed to a company's "innocent" employees by federal investigators executing a search warrant during an investigation into fraudulent overcharging. *See United States* ex rel. *Doe v. John Doe Corp.*, 960 F.2d 318, 322-33 (2d. Cir. 1992). It logically follows, then, that information provided to innocent employees interviewed by an OIG agent investigating the employee's company for false claims would likewise be deemed publicly disclosed.

Given the apparent ease with which information may be "publicly disclosed," federal contractors considering bringing parallel qui tam and breach of contract claims should take precautions to avoid indirectly disclosing essential false claims information to the public, while pursuing discovery of information to support a breach claim.

Original Source Exception

A relator may overcome the public disclosure bar if the relator is an "original source" of the information released into the public domain. *See* 31 U.S.C. § 3730(e)(4)(A)-(B). The current version of the original source exception provides alternative definitions of "original source" based on the timing of the public disclosure.

Under the first definition, a relator who voluntarily discloses to the Government information on which allegations or transactions in a FCA action are based, *prior to public disclosure*, is an original source. *Id*. § 3730(e)(4)(B)(i). The key analysis under this definition focuses on the timing of the disclosures to the Government and the disclosure to the public. . This definition applies to relators who provide salient information to the OIG, Department of Justice, or other federal agency and where subsequently that information is disclosed to the public. This part of the original source exception gives potential relators the ability to work with federal agencies to ferret out false claims without fear of being later barred because of the agency's public disclosure of the information.

Under the second definition, a relator who discloses his or her information to the Government *after* a public disclosure still may be considered an original source if he or she has "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions" and has "voluntarily provided the information to the Government *before* filing" a qui tam action. *Id*. § 3730(e)(4)(B)(2) (emphasis added).

The First Circuit recently addressed the "materially adds" criteria of the second definition, holding that additional information is material if it is significant or essential, and "knowledge of the [information] would affect a person's decision-making." *See United States* ex rel. *Winkelman v. CVS Caremark Corp.*, 827 F.3d 201 (1st Cir. 2016). In *Winkelman*, the Court implied that a "material addition" to publicly disclosed allegations or transactions must add an essential element of the qui tam action that was *not* previously disclosed publicly. The Court conversely reasoned that simply asserting that the same allegedly fraudulent practice occurred over a longer duration of time does not "materially add" to the information already publicly disclosed. *Id*. at 212. The Court likewise determined that repeating the same publicly disclosed allegations in another jurisdiction also does not constitute a "material addition." *Id*.

Under the timing requirements of the original source exception, a relator who discloses their information to the Government, after the information is publicly disclosed, clearly faces additional obstacles in maintaining their qui tam action.

Conclusion

Federal contractors who find themselves in the unique situation of pursuing breach of contract actions and simultaneously considering qui tam actions must carefully consider the interplay between the oftentimes competing interests: discovering as much pertinent information as possible to support each cause of action, and not inadvertently causing the allegations or transactions underlying the qui tam action to be disclosed to the public. Any contractor facing this dilemma should gain a deep knowledge of the public disclosure bar and original source exception before disclosing any information to Government agencies and before finalizing its strategies for bringing its claims.

Don't Delay: Civilian Board of Contract Appeals Denies Government's Attempt to Stay Contractor's Delay Claim

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The Civilian Board of Contract Appeals ("CBCA") recently denied the Government's motion to stay an appeal brought by a construction contractor. The predicate of the Government's argument in support of its motion was that the contractor's claim for a time extension was premature because the project in question had not yet been completed. The CBCA disagreed and ruled that the appeal could proceed even while the remainder of the project continued to be constructed.

Case Summary and Board's Rationale

Appeal of CTA I, LLC, 18-1 BCA ¶ 36995 (Civilian B.C.A.), CBCA 5826, 2018 WL 1403650, concerned a construction contractor's claim for delay, inefficiency, and other costs resulting from the construction of a Department of Veteran's Affairs dialysis center near Richmond, VA. At the time of the appeal, construction was ongoing with a projected completion date of November 2018—approximately three years late as compared to the original project completion date. CTA I, LLC's ("CTA") appeal—again filed in 2017 and while construction of the facility was not yet complete—sought recovery of delay and other costs incurred from the period between notice to proceed through September 30, 2016.

In late 2017, months after the appeal had been filed and docketed with the CBCA, CTA and the Government agreed on a discovery schedule that called for the conclusion of fact discovery by February 28, 2018. On February 28, 2018, the Government filed a motion to stay the case ("Motion") until the project had been completed, which motion CTA opposed. *Appeal of CTA I* at 2018 WL 1403650 *1.

The Government's primary argument in support of its Motion was that in order for CTA to prevail on its delay claim, CTA would need to establish that the Government's acts or omissions somehow delayed the project completion as a whole. According to the Government, whether the delay that was the subject of CTA's instant appeal, actually delayed the project as a whole, would not be known until after the entire project had actually been completed. *Id.*

The CBCA denied the Government's motion, explaining its rationale as follows:

> Even if [the Government's contention regarding delay to project completion] were correct, it would be CTA's problem, not VA's [the Government]. CTA would be at risk of seeing its claim for delay costs through September 2016 denied for lack of proof, a result VA would presumably welcome. In any event, VA's categorical position is wrong. CTA is entitled to try to prove at this juncture that VA caused compensable delay to activities on the project critical path up to the and including September 30, 2016, thereby delaying the future completion date. CTA need not wait until contract completion to litigate its delay claim for that completed,

> discrete period. Indeed, the very this that defines work on the critical path is that the work "has no leeway and must be performed on schedule; *otherwise, the entire project will be delayed*."

Id. (*citing Haney v. United States*, 676 F. 2d 584, 595 (Ct. Cl. 1982) (emphasis added as part of CBCA ruling).

The CBCA went on to further justify its decision by citing the notice provisions in CTA's contract with the Government, which required that CTA submit a claim for delay costs "in writing as soon as practicable after the termination of [a] suspension, delay, or interruption." *Id*. at *2 (*citing* 48 CFR 52.242-12(c) (2013)). The CBCA stated that ongoing performance of a project is not legal grounds for delaying adjudication of a contractor's claim, noting that "delay claims covering discrete periods of contract performance are often consolidated for litigation after a project is complete, but that is by no means a substantive legal requirement as [Government] implies." *Id*. at *2.

Finally, the CBCA rejected the Government's argument that continuing with the case would lead to potentially duplicative discovery and litigation in the event of later claims for delay. *Id*.

Takeaways for Government Construction Contractors

Among other takeaways from *Appeal of CTA I*, contractors performing work for the Government may be emboldened to pursue claims for delay for discrete project periods even when construction is ongoing. And while the CBCA's ruling suggests that such claims will not be stayed as a matter of law, contractors are cautioned that any schedule delay analysis associated with such "discrete project period" claims will likely be carefully scrutinized by the Government and the Board / Court in order to ensure that the overall project completion date would necessarily have been delayed as a result of the discrete period delay. Contractors will need to establish that the facts and the method of schedule delay analysis employed for the discrete period delay (i.e., time impact analysis (prospective and/or retrospective), as-planned versus as-built, or other methods) would result in an overall project extension. There is considerable literature on the efficacy of various types of delay analyses and their proper application to ongoing projects, versus projects that have been completed. *See, e.g.*, ACCE Int'l, *Recommended Practice 29R-03* ("Forensic Schedule Analysis") (2011) and Soc'y of Constr. Law, SCL Delay and Disruption Protocol (2d ed. 2017)). Contractors and their experts should heed this literature and scheduling principles as part of any prosecution of a discrete period delay claim on an ongoing project.