

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Great Lakes Dredge & Dock Company) ASBCA Nos. 53929, 54266
)
Under Contract No. DACW60-99-C-0004)

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OPINION BY ADMINISTRATIVE JUDGE ROME
ON GOVERNMENT’S MOTIONS TO DISMISS

Great Lakes Dredge & Dock Company (Great Lakes) appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, from final decisions of the contracting officer (CO) denying its claims for differing site conditions under the subject Contract No. DACW60-99-C-0004 (sometimes “contract 0004”). The government has moved to dismiss the appeals for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, on the ground that Great Lakes transferred the contract, or an interest therein, to a joint venture in violation of the Anti-Assignment Act, 41 U.S.C. § 15, rendering the contract void. The government further alleges that Great Lakes lacks standing to bring the appeals. For the reasons that follow, we deny the government’s motions.

FACTS FOR PURPOSES OF THE MOTIONS

On 15 January 1999 the United States Army Corps of Engineers (Corps) issued an invitation for bids (IFB) for a contract for maintenance, dredging and disposal of material

from the Charleston Harbor in South Carolina (R4, section 4, tab G-1).¹ The IFB and subsequent contract contained or incorporated by reference the following clauses:

Federal Acquisition Regulation (FAR) 52.214-17, AFFILIATED BIDDERS (APR 1984), § 00100, ¶ 16, which provided²:

(a) Business concerns are affiliates of each other when, either directly or indirectly, (1) one concern controls or has the power to control the other, or (2) a third party controls or has the power to control both.

(b) Each bidder shall submit with its bid an affidavit stating that it has no affiliates, or containing the following information:

(1) The names and addresses of all affiliates of the bidder.

(2) The names and addresses of all persons and concerns exercising control or ownership of the bidder and any or all of its affiliates, and whether they exercise such control or ownership as common officers, directors, stockholders holding controlling interest, or otherwise.

FAR 52.219-9, SMALL, SMALL DISADVANTAGED, AND WOMEN-OWNED SMALL BUSINESS SUBCONTRACTING PLAN (AUG 1996)—ALTERNATE I (OCT 1995), § 00700, ¶ 93, which provides in part that the apparent low bidder, upon the CO's request, shall submit a subcontracting plan, where applicable, addressing subcontracting with the subject small business entities, 52.219-9(c), and that "[f]ailure to submit the subcontracting plan shall make the bidder ineligible for the award of a contract" (*id.*). The plan is to assure, among other things, that the offeror will submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and/or SF 295, Summary Subcontract Report, 52.219-9(d)(10). The clause concludes that:

The failure of the Contractor or subcontractor to comply in good faith with (1) the clause of this contract entitled "Utilization of Small, Small Disadvantaged and Women-Owned

¹ We cite the Rule 4 file in ASBCA No. 53929 as "R4" and that in ASBCA No. 54266 as "2R4." Citations to the motion papers are to those in ASBCA No. 53929. Citations to "G" tabs refer to R4, section 4, and all contract clause citations are to Tab G-1.

² On 4 March 1999, this FAR provision was removed and reserved, effective 3 May 1999 (FAC 97-11, 64 Fed. Reg. 10530).

Small Business Concerns,” or (2) an approved plan required by this clause, shall be a material breach of the contract.

(52.219-9(i)).

FAR 52.222-11, SUBCONTRACTS (LABOR STANDARDS) (FEB 1988), § 00700, ¶ 21, which requires in part that the contractor deliver to the CO within 14 days after contract award a completed Statement and Acknowledgment Form (SF 1413) for each subcontract, including the subcontractor’s acknowledgment that various specified labor standards clauses have been included in the subcontract.

FAR 52.236-1, PERFORMANCE OF WORK BY THE CONTRACTOR (APR 1984), § 00800, ¶ 3, which states (with the blank for an appropriate percentage filled in):

The Contractor shall perform on the site, and with its own organization, work equivalent to at least forty (40%) percent of the total amount of work to be performed under the contract. This percentage may be reduced by a supplemental agreement to this contract if, during performing the work, the Contractor requests a reduction and the [CO] determines that the reduction would be to the advantage of the Government. . . .

FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984), § 00700, ¶ 52.

According to Mr. Russell F. Zimmerman, a Great Lakes division engineer, it recognized prior to bidding that it did not own or operate sufficient equipment to complete the project on time (app. opp., ex. 1 (29 Apr. 2003 Zimmerman dec., ¶¶ 1, 4, 7)). According to Mr. Ancil Taylor, a vice president of Bean Stuyvesant LLC (“Bean”), it also concluded that it did not have sufficient equipment available (app. opp., ex. 2 (29 Apr. 2003 Taylor dec., ¶¶ 1, 4)).

Bid opening was to be on 23 February 1999 (tab G-3, amend. 0003). On 22 February 1999, Great Lakes and Bean entered into a “Great Lakes/[Bean] Joint Venture Agreement” (pre-bid JVA), signed by Mr. Richard M. Lowry, as Great Lakes’ chief operating officer and executive vice president, and Mr. Taylor, as Bean’s vice president. The agreement noted that Bean operated the Dredge Stuyvesant, a heavy class hopper dredger expected to remove material economically but not always to make contract grade, which could be deployed for the contract only four months per year; it did not operate equipment capable of handling the required offshore digging or own a barge fleet to transport material to the disposal area; and Great Lakes did not operate appropriate hopper dredgers but otherwise had the necessary equipment. (Tab G-44)

The pre-bid JVA concluded:

THEREFORE, in order to complete the work on time, achieve the required monthly productions, maintain dredging on the project year round as required and comply with all environmental restrictions, Great Lakes and [Bean] have agreed to bid and, if successful, execute the contract together as a Joint Venture.

Great Lakes shall be the project sponsor.

The contract shall be bid in the name of Great Lakes who will subcontract the total project to the Great Lakes/[Bean] Joint Venture.

The result in the share of profit or losses in the Joint Venture will be 50% Great Lakes and 50% [Bean].

The structure of the Joint Venture will be fully integrated with each party supplying plant to the Joint Venture at agreed rates as stated in Appendix A.^[3] Those items noted as Joint Venture will be charged directly to the Joint Venture at cost.

....

In the event that this joint venture is low bidder and is awarded the contract for performance of the works, then the parties shall enter into a more detailed formal agreement for the performance of the works, which will include protections to the Joint Venture for excessive mechanical breakdown of the rented equipment.

(*Id.* at 0041)

³ Appendix A is marked as “Protected Material To Be Disclosed Only In Accordance With Terms Of Protective Order.” The parties submitted a “Stipulation and Protective Order,” adopted by the Board on 31 January 2003. The government has moved that all documents relevant to the joint venture’s formation and management be declared unprotected. The order allows use of otherwise-protected material in the prosecution or defense of appeals under contract 0004, and for protection challenges. The burden of proof is upon the one seeking protection. Appellant has not responded to the government’s motion, and we grant it as unopposed.

On 23 February 1999, Great Lakes submitted a bid in its own name, signed by Mr. Bradley T. Hansen, one of its vice presidents, in the estimated amount of \$58,910,810. Weeks Marine, Inc. (Weeks) was the only other bidder. Great Lakes was the low bidder. (Tabs G-5, -45; app. opp., ex. 4 (29 Apr. 2003 Hansen dec., ¶ 1)) Its “Affidavit Of Affiliates” stated that it was the “parent/holding company” of named affiliates, one of which was a joint venture; it did not list its venture with Bean (tab G-47). Great Lakes’ bid document stated that “[t]he offeror agrees to perform the work required at the prices specified below in strict accordance with the terms of this solicitation” (tab G-1 at 4, ¶ 17, tab G-45 at 2, ¶ 17). In its “Representations & Certifications,” under FAR 52.204-3, TAXPAYER IDENTIFICATION (OCT 1998), Great Lakes gave its tax identification number, identifying itself as a “corporate entity” (tab G-6 at ¶ 4). On its “Plant And Equipment Schedule,” Great Lakes included the Dredge Stuyvesant (tab G-6, at ¶ 7 and attach.). It represented that part of the work would be subcontracted; named Bean as the subcontractor; and noted that Bean was not a small business. Great Lakes estimated that 20 percent of the work would be subcontracted. (Tab G-6, at ¶ 13) Its bid bond, executed by Mr. Hansen and the surety, was in Great Lakes’ name. Under “Type Of Organization,” which included “joint venture” among the options, the bond identified Great Lakes as a corporation. (Tab G-46 at 1)

The government approved Great Lakes’ “Small Business and Small Disadvantaged Business Subcontracting Plan,” dated 1 March 1999, which identified Great Lakes as the “contractor” (tab G-48 at 8), and under “Goals,” stated in part:

- a. Total estimated dollar value of all planned subcontracting i.e., with all types of organizations under this contract, is \$16,926,000.00

....

Goals for all planed (sic) subcontracting, excluding subcontracted dredging work, meet or exceed contract goals assigned to Charleston District. Approximately 48% of all planned subcontracting work will be subcontracted to a dredging contractor with a large hopper dredge. A Small Business Hopper Dredge Contractor with a large hopper dredge is not available.

(*Id.* at 9) Great Lakes estimated that 40.8% of its subcontracting would be with small businesses (*id.*).

The Corps’ pre-award survey noted that Great Lakes had successfully completed prior dredging contracts and that it had adequate cash flow to perform the project. On 4 March 1999, the CO issued a “Determination Of Responsibility” concluding, pursuant to

the survey and FAR 9.105, PROCEDURES, that Great Lakes was responsible (tabs G-11, -49). The responsibility determination did not include the joint venture or Bean. According to Mr. Taylor, Bean has been the low bidder on more than 40 Corps projects and the Corps has always found it to be a responsible contractor (Taylor dec., ¶ 9).

On 4 March 1999 the government awarded contract 0004 to Great Lakes in the estimated amount of \$58,910,810 (tab G-45). Great Lakes' 8 March 1999 internal Bid Results report identified "JV/GL-Bean Stuy" as the low bidder (tab G-60). On 11 March 1999 Great Lakes submitted performance and payment bonds in its name as principal, each of which identified it as a "corporation," and not as a "joint venture," one of the listed alternatives. The performance bond, executed by the surety and R.M. Lowry, as Great Lakes' executive vice president and chief operating officer, stated that Great Lakes and the surety were "firmly bound to the United States of America" in the sum of \$58,910,810. Mr. Lowry, Mr. Hansen and the surety executed the payment bonds, which bound Great Lakes and the surety to the United States in the sums of \$23,564,324 and \$2,500,000. (Tab G-50)

The Corps issued a notice to proceed to Great Lakes on 12 March 1999, which it acknowledged (tab G-12). It is not clear whether Great Lakes submitted any SF 1413 subcontract Statement and Acknowledgment forms. None are in the record.

By letter to Great Lakes dated 25 March 1999, the CO reminded it of its obligation to file semiannual SF 294 and SF 295 subcontracting reports and included copies of the report forms. Those for SF 294 noted that "[s]ubcontract award data reported on this form by prime contractors/subcontractors shall be limited to awards made to their immediate subcontractors." (Tab G-53 at 4, ¶ 7)

On 31 March 1999, the Corps issued unilateral Modification No. P00001, which exercised Schedule B option items and increased the contract amount to \$74,667,110 (tab G-13). A "Consent Of Surety And Increase Of Penalty," executed by the surety and Great Lakes, issued the same day, increasing one of Great Lakes' payment bonds (tab G-51).

In June, 1999, Great Lakes and Bean entered into a joint venture agreement (post-bid JVA), effective 4 March 1999, the date of contract award to Great Lakes (tab G-52). Mr. Hansen, who signed for Great Lakes, declares that it did not intend to transfer the contract to the joint venture or to substitute the venture for Great Lakes as contractor, and that it was Great Lakes' understanding and intent that it remained the contractor, responsible to the Corps for work performance (Hansen dec., ¶ 4). Mr. Taylor declares similarly on behalf of Bean (Taylor dec., ¶ 7).

The post-bid JVA provides in part:

WHEREAS the [Corps] (“Client”) has entered into a contract (“Contract”) with [Great Lakes]

AND WHEREAS the Parties desire to perform the Contract as a joint venture

. . . .

1.1 [Great Lakes] and [Bean] hereby associate themselves as an integrated joint venture for the purpose of performing the Contract

1.2 This Joint Venture is created solely for the purpose of performing the Contract and for no other purpose

1.3 All contracts and commitments entered into by this Joint Venture shall be performed under the name of this Joint Venture. All money, bank accounts and other property acquired by this Joint Venture shall be the property of this Joint Venture.

1.4 The Management Committee shall wind up this Joint Venture when it has determined that this Joint Venture has no further activities to pursue or perform with respect to the Contract and that all [Great Lakes’] rights, obligations and liabilities thereunder have been finally settled and performed.

. . . .

1.6 This Joint Venture shall have no employees. All persons of whatever level seconded to this Joint Venture shall remain employed and on the payroll of the Party by whom each person is employed.

. . . .

2.1 This Joint Venture shall perform the Contract and undertake the Contract Works (“Works”) required as if the Joint Venture had replaced [Great Lakes] in the contract by means of a novation of the Contract. Accordingly, [Great Lakes] shall issue an irrevocable instruction to the Client assigning all payments under the Contract to a bank account owned by this Joint Venture and, in consideration therefor, this Joint Venture shall indemnify and hold [Great Lakes] harmless

from and against all liabilities it may incur to the Client under the Contract and/or in tort.

2.2 For the performance of the Works, this Joint Venture shall hire the “Texas” cutter-suction dredging spread from [Great Lakes] and the “Stuyvesant” trailing hopper suction dredger from [Bean]

. . . .

2.4 Each party shall, as required by the Management Committee, provide this Joint Venture with the benefit of its individual experience, technical knowledge and skill and shall in all respects bear its share of the responsibility and burden of performing the Works.

[3] Except as otherwise expressly provided in this Agreement, the shares of the Parties in this Joint Venture shall be as follows:

- [Great Lakes]: 50% (fifty percent)
- [Bean]: 50% (fifty percent)

. . . .

4.1 A Management Committee of two members shall manage this Joint Venture, one appointed by each Party. . . .

4.2 At meetings, the attending member or alternate appointed by [Great Lakes] shall act as chairman (“Chairman”). Each Party shall have one vote of equal weight and value to be exercised by its attending member or alternate. . . .

4.3 If the Management Committee is unable to reach a decision because of deadlock in voting and such will, in the Chairman’s opinion, seriously jeopardize the proper or timely execution of the Works, the Chairman is authorized to require the Parties to undertake appropriate actions to safeguard the best interests of the Works and this Joint Venture. The Chairman is also authorized to direct the Project Manager and, through him, his staff, to take those steps that are appropriate, within his authority, to safeguard the best interests of the Works and this Joint Venture. . . . Notwithstanding the

foregoing, decisions . . . as to the distribution, whether interim or final, of any profit or surplus funds must be reached unanimously.

....

4.5 The Management Committee is the supreme authority of this Joint Venture and is expressly authorized to make all decisions it deems appropriate for the operations of this Joint Venture including, without limitation to the generality of the foregoing:

....

c) direct the commencement, settlement, compromise or abandonment of any arbitration or litigation by the Joint Venture or by [Great Lakes] on its behalf

....

g) approve Amendments, Supplements and/or modifications to the Contract

....

i) delegate appropriate authority to the Project Manager

....

k) hire, acquisition and disposal of major items of plant and equipment

l) levels of authority for the placing of subcontracts and purchase orders and other purchasing policy

....

5.1 Subject to the overriding authority of the Management Committee, the execution and carrying out of the Works shall be managed by a Project Manager appointed by [Great Lakes] with the approval of [Bean]. The powers and duties of the Project Manager are set out in the Second Schedule.

....

[6] [Great Lakes] shall provide the bond(s) needed for the Contract. The cost of the bond(s) shall be accounted for as a Joint Venture cost.

....

13.2 This Joint venture Agreement is a confidential document and shall be treated as such.

....

14.1 Should either Party (“Defaulting Party”) [essentially, dissolve or become financially unable to fulfill its joint venture obligations] the other (“Surviving Party”) may . . . declare it to be in default.

14.2 If . . . any default remains uncured, the Surviving Party shall be entitled to exclude the Defaulting Party . . . from further participation in the management and profits of this Joint Venture and may take over its rights under this Agreement The Surviving Party shall be entitled to wind up the Joint Venture and to carry on and complete the performance of the Works.

....

14.4 In such circumstances the Defaulting Party shall execute all deeds and documents and do all things necessary or expedient to enable the Surviving Party to continue the performance of the Works without reference to the Defaulting Party

14.5 In the event of the Defaulting Party being excluded, all references in this Agreement to the administration and direction of the Joint Venture by the Parties and to agreements and approvals by them (whether or not through the Management Committee) shall be deemed to exclude the Defaulting Party.

....

15.5 [Great Lakes] shall take all reasonable measures to allow this Joint Venture to prosecute “pass through” claims arising from the Client’s administration, interpretation or enforcement of the Contract.

....

[19] The existence of this Joint Venture shall not be publicised [sic]. Subject only to any restrictions in the Contract, [Great Lakes] shall be entitled, at its own cost and expense, to publish and advertise its participation in the Contract provided its gives due acknowledgment to [Bean] as its “subcontractor” for the trailing hopper suction dredging works.

(Tab G-52, at 1-10)

The referenced “SECOND SCHEDULE” vested the project manager with: “day to day management of [the] joint venture;” “primary contact with the Client;” “ensur[ing] that all legal and contractual requirements are complied with, that agreed Joint Venture procedures are implemented . . . for efficient administration of the Contract and the carrying out of the Works;” “authority to represent [Great Lakes] towards the Client’s Representatives under the Contract;” and supervising purchase orders and subcontract placement and authorizing payments on behalf of the venture. The Management Committee was to delegate to the project manager all powers necessary or expedient to perform the contract work properly. He was to refer to the committee any special matter that he deemed potentially beyond the scope of his powers. (*Id.* at 12-13) A Third Schedule called for agreements with subcontractors, vendors and suppliers to the joint venture, including the joint venture parties, to indemnify it, Great Lakes, and the Corps, from certain claims arising from work performance or property destruction (*id.* at 16).

Mr. Hansen was chairman of the joint venture’s Management Committee (Hansen dec., ¶ 3). Mr. Zimmerman served, and communicated with the Corps, as Great Lakes’ project manager for contract 0004. He was also the joint venture’s project manager, but remained Great Lakes’ employee. (*E.g.*, tabs G-16, -17, -19; Zimmerman dec., ¶¶ 2, 8)

Great Lakes submitted SF 294 biannual (fiscal year (FY)) subcontracting reports covering contract 0004, each of which identified it as the “prime contractor” and stated that the “Current Goal” for subcontract awards was \$6,905,603 (40.8%) to small business concerns and \$10,020,397 to large ones. Its 17 April 2001 report stated that the “Actual Cumulative” amount subcontracted to small business concerns as of 31 March 2001 was \$6,719,990 (70%) and to large business was \$2,915,329 (30%). (Tab G-54)

Great Lakes also submitted biannual SF 295 summary subcontract reports, signed by Mr. Hansen, which identify it as the “prime contractor.” All but a 27 April 2000 report listed numerous contracts, including 0004. (Tab G-55) That report covered 0004 alone, but still was in the name of Great Lakes as prime contractor and did not mention a joint venture (*id.* at 10 of 13). On 10 May 2000, Great Lakes submitted a revised SF 295, to replace the 27 April report. The revised form listed numerous contracts, including 0004, and reported a substantially greater dollar amount subcontracted to small businesses than had the report on contract 0004 alone. Great Lakes stated:

This contract was bid as Great Lakes Dredge & Dock Company. It was previously filed as a joint venture but it is not. It is an individual contract under Great Lakes and should be included on the summary [sic] report 295 for Great Lakes. So please disregard the separate 295 originally sent for [contract 0004].

(*Id.* at 7 of 13)

On 26 October 2001 the CO received Great Lakes’ SF 294 and SF 295 reports for the end of FY 2001. The SF 294 stated that “[d]ue to changes in method of completing work, a larger than expected portion of the work was subcontracted to a Large Bus (Bean Styvesant) [sic].” Great Lakes’ “Current Goal” for subcontract awards remained \$6,905,603 to small businesses and \$10,020,397 to large ones, but the “Actual Cumulative” amount subcontracted to small businesses was said to be \$8,076,298 (25%), with \$24,880,399 subcontracted to large business concerns (75%). (Tab G-56)

The parties agree that Great Lakes never issued an irrevocable instruction to the Corps assigning contract 0004 payments to a bank account owned by the joint venture (gov’t mot. at 13, n.8; app. opp. at 16). It is also uncontested that Great Lakes signed all contract modifications required to be signed by the contractor and that it submitted all pay estimates (gov’t mot. at 8; app. opp. at 6). The contract correspondence of record is between the Corps and Great Lakes.

Project Manager Zimmerman’s correspondence to the Corps repeatedly mentioned dredging with the Stuyvesant (*e.g.*, tabs G-17 *et seq.*, tab G-32). Great Lakes’ daily Construction Quality Control Reports, verified by the “contractor,” listed under “Contractors/Subcontractors”: “A. [Great Lakes],” “B. [Bean]” (tab G-24). The Corps’ Quality Assurance Reports (QAR) Daily Logs of Construction - - Civil listed under “Contractor/Subcontractors and Area of Responsibility for Work Performed Today,” Great Lakes, Bean, and sometimes dredging work by Weeks. Both sets of reports, and various other reports of record, regularly note work performed by the Stuyvesant. (*Id.*)

The government has not rebutted Mr. Zimmerman’s declaration that the joint venture did not own dredging equipment; Great Lakes owned or operated the cutter suction dredges

Alaska, Illinois, and Texas, which performed contract work with crews and supervisors employed by Great Lakes; and its employees and equipment performed more than fifty percent of the project work (Zimmerman dec., ¶¶ 9, 10).

The contract was completed in August 2001 (app. opp., ex. 3). On 24 September 2001, Great Lakes submitted a \$1,736,708 differing site conditions claim to the CO on behalf of itself as contractor and Bean as its alleged subcontractor (R4, section 3 at 1). Mr. Hansen certified the claim for Great Lakes as “Contractor” (*id.* at attach. 10). By letter to the CO dated 7 November 2001, Mr. Hansen stated that the claim “contains confidential and proprietary information regarding the operations and costs of Great Lakes and its subcontractor, [Bean]” (tab G-34 at 1).

In March 2002, in connection with Great Lakes’ proposal for another Corps project, it represented that it had been the prime contractor under contract 0004 (app. opp., ex. 3).

By final decision dated 13 June 2002, the CO denied Great Lakes’ claim on the merits (R4, section 2). On 5 September 2002 Great Lakes appealed to the Board and filed its complaint, which identified it as the contractor under contract 0004, mentioned that it had dredged with the Stuyvesant, but did not name Bean or any subcontractor or joint venturer. The Board docketed the appeal as ASBCA No. 53929 on 5 September 2002. (R4, section 1; complaint, *e.g.*, ¶¶ 1, 4, 10, 13)

On 26 July 2002, Great Lakes submitted a separate differing site conditions claim to the CO, in the amount of \$11,021,859, on behalf of itself as contractor and Bean as its alleged subcontractor (2R4, section 3, vols. I, IIIA, IIIB). Mr. Hansen certified the claim on behalf of Great Lakes (*id.* at Vol. II, ex. 16).

The parties agree that the government first became aware of the Great Lakes/Bean joint venture in January and February 2003, during discovery (gov’t mot. at 10-11; app. opp. at 10). On 4 April 2003, the government filed its motion to dismiss ASBCA No. 53929.

By final decision dated 2 May 2003 the CO denied Great Lakes’ second claim on the ground that the contract was “deemed void for violation of the Anti-Assignment Act and material contractual provisions” (2R4, section 2, at 19). Great Lakes appealed to the Board on 31 July 2003 and filed its complaint, which identified it as the contractor under contract 0004 and mentioned the Stuyvesant, but did not name Bean or any subcontractor or joint venturer. On 1 August 2003 the Board docketed the appeal as ASBCA No. 54266. (2R4, section 1; complaint, *e.g.*, ¶¶ 1, 25, 26) On 11 September 2003, the government moved to dismiss ASBCA No. 54266. On 21 October 2003, after consultation with the parties, the Board consolidated ASBCA Nos. 53929 and 54266.

Mr. Taylor and Mr. Hansen have represented that, as Great Lakes is the prime contractor, if the Board determines that it is the proper party to proceed with the claims,

Bean and the joint venture will not pursue any litigation or claims against the Corps relating to contract 0004 (Taylor dec., ¶ 8; Hansen dec., ¶ 6). The declarations are ambiguous, but we infer that there is no intent to abandon “pass-through” claims.

DISCUSSION

The government has moved to dismiss these appeals for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted on the ground that appellant transferred contract 0004, or an interest in it, to a joint venture, thereby violating the Anti-Assignment Act and rendering the contract void. The Act provides in relevant part:

No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

41 U.S.C. § 15(a). The government also claims that, due to the contract transfer, appellant lacks standing to prosecute these appeals.

The government asserts that the joint venture came into existence on 22 February 1999, with the pre-bid JVA; appellant transferred contract 0004 to the joint venture through the post-bid JVA, which was effective as of the date of contract award; but appellant concealed the joint venture and misrepresented the identity of the contractor performing the work. The government alleges that the magnitude of appellant’s violation of the Anti-Assignment Act is demonstrated by its violations of federal subcontracting requirements, its contractual obligations to identify affiliates and to perform 40 percent of the work itself, and responsibility determination criteria.

Appellant denies that it violated the Anti-Assignment Act or any of the allegedly associated subcontracting and other provisions asserted by the government. Appellant characterizes the pre-bid JVA between Great Lakes and Bean as an agreement to enter into a joint venture to perform the project if Great Lakes’ bid were successful. It contends that it did not enter into that venture until June 1999, when it executed the post-bid JVA, which did not purport to transfer the contract, or any interest therein, to the venture or to substitute it for Great Lakes as the contractor.

The tenor of the government’s motion is that it seeks a dismissal with prejudice, on the merits. A dismissal for lack of jurisdiction would not be on the merits but would mean that the Board was not empowered to hear and decide the subject matter of the dispute.

Gould, Inc. v. United States, 67 F.3d 925, 929 (Fed. Cir. 1995). The contention that contract 0004 is a nullity does not itself deprive us of jurisdiction. *Id.* at 929-30. Under the circumstances, the government's motion for failure to state a claim upon which relief can be granted, which would be on the merits, is the more apt. *Do-Well Machine Shop, Inc. v. United States*, 870 F.2d 637, 639-40 (Fed. Cir. 1989). The Board assumes jurisdiction to decide whether appellant's allegations state a cause of action upon which we can grant relief as well as to determine issues of fact. *Bell v. Hood*, 327 U.S. 678, 682 (1946). A dismissal for failure to state a claim will not be granted unless it appears beyond doubt that appellant cannot prove any set of facts in support of its claim that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

If, in connection with a motion to dismiss for failure to state a claim, the parties present matters outside the pleadings that the Board does not exclude, the motion typically is treated as one for summary judgment. *Hai*, ASBCA No. 53375, 02-2 BCA ¶ 31,971, *recon. denied*, 03-1 BCA ¶ 32,130, *aff'd*, 2003 U.S. App. LEXIS 25579 (3 Dec. 2003) (nonprecedential); *see also* Fed. R. Civ. P. 12(b). The government relies upon Rule 4 file documents. Appellant relies upon such documents and three sworn declarations. The parties have had full opportunity for discovery and to brief the issues. Thus, we treat the government's motion as one for summary judgment.

It is established that summary judgment is appropriate when there is no genuine issue of material fact and the movant, which bears the burden of proof, is entitled to judgment as a matter of law. We do not weigh the evidence to find facts, but examine it to determine whether a genuine dispute exists as to any material fact, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986); *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 1562-63 (Fed. Cir. 1987). We draw reasonable inferences from the facts in favor of the opposing party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The Anti-Assignment Act is often discussed together with the Assignment of Claims Act, 31 U.S.C. § 3727 (formerly 31 U.S.C. § 203). *See Fireman's Fund Insurance Co. v. United States*, 313 F.3d 1344, 1349 (Fed. Cir. 2002). The Acts are said generally to share the same concerns, *Tuftco Corp. v. United States*, 614 F.2d 740, 744 n.4 (Ct. Cl. 1980). They were intended to prevent fraud, particularly in the buying up of claims against the government; to protect it from having to deal with multiple persons or strangers to the contract; and to eliminate conflicting demands for payment and chances of multiple litigation and liability. *Hobbs v. McLean*, 117 U.S. 567, 576 (1886); *Seaboard Air Line Railway v. United States*, 256 U.S. 655, 657 (1921); *Tuftco, id.*; *Patterson v. United States*, 354 F.2d 327, 329 (Ct. Cl. 1965). The Anti-Assignment Act, in particular, was intended to secure to the government the personal attention and services of the contractor, who was responsible for performing the contract's duties and assuming its liabilities, and to prevent the acquisition of mere speculative interests, which could lead to irregularities and fraud. *Francis v. United States*, 11 Ct. Cl. 638, 640-41 (1875), *aff'd*, 96 U.S. 354 (1878);

Thompson v. Commissioner of Internal Revenue, 205 F.2d 73, 76 (3d Cir. 1953). It was meant to apply to situations where a contractor:

assigns to another the right and the duty to perform the contract and receive the money which the Government has agreed to pay. A person not contractually bound to the Government would, if permitted, enter into performance of the contract, and the Government's dealings, with regard to supervision, inspection, etc., would be with him, and not with the contractor. This would give rise to the evils mentioned by the Supreme Court of the United States in *Hobbs v. McLean*

Chemicals Recovery Co., Inc. v. United States, 103 F. Supp. 1012, 1018 (Ct. Cl. 1952). In determining whether appellant's joint venture agreements violate the Anti-Assignment Act, we consider whether they obviate the statute's purposes. *Tuftco Corp. v. United States*, *supra*, 614 F.2d at 744; *Thompson v. Commissioner of Internal Revenue*, *supra*, 205 F.2d at 75-76; *see also Optonetics*, ASBCA No. 17015, 73-2 BCA ¶ 10,173.

The pre-bid JVA first provided that Great Lakes and Bean had agreed to bid, and if successful, "execute" the contract as a joint venture. "Execute" apparently meant "perform," because the agreement next stated that Great Lakes would be the project sponsor; the contract would be bid in its name; Great Lakes would subcontract the total project to the joint venture; and Great Lakes and Bean would share equally in the venture's profits or losses. However, the agreement concluded that, in the event the "joint venture" was the low bidder and was awarded the contract, the parties would enter into a more detailed formal agreement for performance. There was no assignment; the government had not yet awarded a contract.

The post-bid JVA recognized that contract 0004 was between the government and appellant ("WHEREAS the [Corps] ("Client") has entered into [contract 0004] with [Great Lakes]"). The purpose of the post-bid JVA was to provide for performance by the joint venture. It stated that appellant would: appoint the joint venture Management Committee's chairman, who was to have the deciding vote in the event of disagreements over project performance; appoint the project manager, with Bean's approval; and provide the contract bonds, at joint venture cost. It acknowledged appellant's predominant role and did not explicitly mention assignment or transfer of contract 0004.

Appellant and Bean also acted as though the joint venture agreements were performance vehicles, not assignments. Appellant, the contract awardee and signatory, provided the contract bonds in its name. Contract correspondence and submissions were between appellant and the government. Appellant signed the contract modifications required to be signed by the contractor, and it submitted all pay estimates. Appellant filed and certified the contract claims.

The government characterizes the post-bid JVA's statement that the joint venture would perform the contract "as if" it had replaced appellant by means of a contract novation as an assignment. The statement continues, "[a]ccordingly, [Great Lakes] shall issue an irrevocable instruction" to the government assigning all contract payments to a joint venture bank account. No such instruction issued. Reading the post-bid JVA as a whole, we conclude that the statement stops short of an actual contract transfer, particularly because this portion of the agreement was not realized. *See Dougherty v. United States*, 18 Ct. Cl. 496 (1883) (parties did not pursue, or claim under, alleged invalid assignment; court held: "This might be a good defense if [the assignee] were suing; but the court is not willing to hold that a contract is so vitiated by an attempted assignment that the parties cannot revoke the assignment and recover in the name of the contractor on the original contract after full performance," 18 Ct. Cl. at 503-04); and *see Giuliani Associates, Inc.*, ASBCA No. 51672, 00-1 BCA ¶ 30,780.

The government also focuses upon the post-bid JVA's provisions that, if either party defaulted under that agreement, the other would have the option to wind up the joint venture and "carry on and complete" performance of contract 0004. The default contingency did not occur. Moreover, the post-bid JVA called for the defaulting party to execute documents and take necessary actions to enable the other to continue contract performance. Thus, if appellant had defaulted, it presumably would have been responsible for arranging with its surety and the government for Bean's completion of the contract. That default would not have assigned the contract to Bean or absolved appellant of its contractual liability to the government. *See Manual M. Liodas*, ASBCA No. 12829, 69-1 BCA ¶ 7498 (prime contractor and subcontractor had realized, pre-bid, that prime lacked funds and plant capacity to perform government contract; subcontract agreement that, if prime could not complete its portion of contract work, subcontractor's performance would be enlarged to include that work, did not violate Anti-Assignment Act; prime contractor, which ceased operation prior to contract completion, remained responsible to government).

That appellant and Bean performed contract 0004 through a joint venture arrangement, planned pre-award, does not itself violate the Anti-Assignment Act. *Hobbs v. McLean, supra* (no violation of Act when government contract bidder entered into partnership agreement to contribute half the partnership capital; his two partners were to provide remainder and perform contract work; after award to bidder, the two did all work and advanced most of the money); *Hollerbach v. United States*, 47 Ct. Cl. 236 (1912), *rev'd on other grounds*, 233 U.S. 165 (1914) (partnership that entered into government contract organized corporation, prior to work commencement, which completed work under direction of partners, who provided contract bond; carried on all correspondence with government; and received all contract payments, although contract accounts were carried on corporation's books; no violation of Act because partners never relinquished complete control and management nor contract emoluments and corporation's work not different from that of any other employee); *Thompson v. Commissioner of Internal Revenue, supra*

(discussing *Hollerbach*: “While the Supreme Court reversed on unrelated grounds its disposition clearly evidenced its approval of the ruling of the Court of Claims that the contract had not been voided under [the Anti-Assignment Act] by reason of its transfer by the partners to the corporation,” 205 F.2d at 77); *Stout, Hall & Bangs v. United States*, 27 Ct. Cl. 385 (1892) (partnership awarded government contract performed work through corporation it had planned, pre-bid, to form; no assignment found; contractor has right to fulfill its contract duties in business manner that best pleases it, provided it retains contractual responsibility to government and does not seek to put another contractor in its place); *Field v. United States*, 16 Ct. Cl. 434 (1880) (prior to signing government contracts, awardee entered into agreement with others that contracts would be held and operated for their mutual benefit; court held agreement made to raise performance money, not to influence bidding or prejudice government; contractor attended to work and undertook his contractual responsibilities, without injury to government; court distinguished cases, such as *Francis v. United States*, *supra*, cited by government here, where “contractor was a merely nominal party who never himself performed or attempted to perform the contract, but so transferred it as to substitute the assignee in his place as the real party in interest throughout,” 16 Ct. Cl. at 444⁴).

Like *Francis v. United States*, the other cases the government cites are distinguishable. For example, in *McPhail v. United States*, 181 F. Supp. 251 (Ct. Cl. 1960), two individuals contracted away their right to perform their government contract, or to require its performance, to a third individual, over whom they retained no control. All contract monies were to be paid to a bank account under that individual’s control. The court found that the arrangement would force the government to deal with a stranger to the contract. In *NGC Investment and Development, Inc. v. United States*, 33 Fed. Cl. 459 (1995), the contractor sold all of its assets and liabilities, including its government contract, to another company, which completed the contract work. The contractor concealed the assignment of its contract and continued to correspond with and seek payment from the government, representing that it had performed the work when, in fact, it had had no further role in the contract after the assignment.

Appellant’s bid package and subcontracting reports, among other things, reflected significant contributions by Bean and its equipment to contract performance. Nevertheless, appellant represented to the government that Bean was its subcontractor and deliberately kept its joint venture agreements confidential. Still, that secrecy does not convert a business arrangement into a prohibited contract assignment. In administering the contract, the government was not required to deal with a stranger but continued to deal with the contract signatory, from inception through completion.

⁴ The court also stated that it did not appear that the government had objected to the arrangement prior to trial, but it is not clear whether the government learned of the arrangement during contract performance.

We conclude that appellant's joint venture agreements did not assign contract 0004 in violation of the Anti-Assignment Act. Even if they were "fairly open to two constructions, the presumption is that they were made in subordination to and not in violation of" the Act and that they are lawful. *Hobbs v. McLean, supra*, 117 U.S. at 576.

Thus, appellant, as a contractor under the CDA, has standing to pursue these appeals. *See JP, Inc.*, ASBCA Nos. 38426, 38427, 90-1 BCA ¶ 22,348, *aff'd on recon.*, 90-1 BCA ¶ 22,616. Regardless of how appellant and Bean defined their own working relationship, *vis a vis* the government, the joint venture, or Bean (and, in this decision, we need not decide which), was a subcontractor to appellant. Under FAR 44.101, "subcontractor" "means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor." 48 C.F.R. § 44.101 (1999). *See also Stout, Hall & Bangs v. United States, supra* (court described corporation formed by contractors, and another company that performed part of contract work, as contractors' "instruments in fulfilling the contract" and as "subcontractors.") Appellant, as the prime contractor, can seek to recover alleged extra contract costs regardless of whether the pertinent services were performed personally or through another. *United States v. Blair*, 321 U.S. 730, 737-38 (1944).

The government's arguments, made in support of its motions to dismiss, that appellant violated subcontracting requirements and material contract provisions, do not bear upon the issue before us of whether it transferred its contract in violation of the Anti-Assignment Act. In any case, appellant denies those contentions, which involve disputed issues of material fact that the current record is inadequate to resolve.

DECISION

The government's motions to dismiss, which we have converted to motions for summary judgment, are denied.

Dated: 23 January 2004

CHERYL SCOTT ROME
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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 Nos. 53929, 54266, Appeals of Great Lakes Dredge & Dock Company, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals