

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Giuliani Associates, Inc.) ASBCA No. 51672
)
Under Contract No. NAS5-96139)

APPEARANCE FOR THE APPELLANT: Herman Braude, Esq.
Braude & Margulies, PC
Washington, D.C.

APPEARANCE FOR THE GOVERNMENT: Lawrence F. Watson, Esq.
Chief Counsel
Goddard Space Flight Center
National Aeronautics and Space Administration
Greenbelt, MD

OPINION BY ADMINISTRATIVE JUDGE YOUNGER
ON RESPONDENT'S MOTIONS TO DISMISS AND TO DISQUALIFY
APPELLANT'S COUNSEL

Respondent has filed three motions in this appeal of the default termination of a construction contract. In its first motion, respondent argues that the appeal must be dismissed, insisting that we lack jurisdiction because appellant improperly transferred the contract and thereby rendered it void. In its second motion, respondent asserts that appellant's counsel should be disqualified because he previously represented both appellant and the purported assignee of the contract at issue. In its third motion, respondent argues that the complaint should be dismissed for failure to state a claim on which relief can be granted. We deny all three motions.

BACKGROUND

By date of 26 September 1996, respondent awarded the captioned contract to appellant to upgrade a sewage treatment plant at the Goddard Space Flight Center in Wallops Island, Virginia. (R4, tab 1 at 2) Appellant is identified in the award document as "Giuliani Assoc., Inc. d/b/a G.A.I." (*Id.* at 3) The contract contained various standard clauses, including FAR 52.232-23, ASSIGNMENT OF CLAIMS (JAN 1986), and FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984). (R4, tab 97 at 33, 34)

It is undisputed that, during performance, appellant entered into an asset purchase agreement with Giuliani Construction, Inc. (Giuliani Construction). Effective as of

30 September 1997, appellant agreed, subject to specified conditions, to sell to Giuliani Construction “free and clear of all Liens, all right title and interest of [appellant] in and to all of the Purchased Assets.” (Motion, attach. 5 at 5) The “Purchased Assets” included two contracts, one of which was the “contract by and between [appellant] and NASA, Contract Number NAS5-96139, entitled: Upgrade of Sewage Treatment Plant, NASA, Goddard Space Flight Center, Wallops Island, Virginia.” (*Id.* at 1) The “Purchased Assets” also included those assets that appellant acquired or owned in performance of this and the other contract, appellant’s accounts receivable resulting from the two contracts, as well as inventories, subcontractor and vendor contracts, vehicles, permits, approvals, licenses and certifications, all intellectual property, records and “rights and claims against others under the Contracts.” (*Id.* at 1-2) Giuliani Construction also generally assumed appellant’s liabilities under the contracts. (*Id.* at 2)

The asset purchase agreement also included conditions in article 2.2, Assumed Liabilities. The following condition is relevant here:

(c) Notwithstanding to [sic] foregoing, if the sale of any Contract, as defined and listed in the Purchased Assets, would cause a breach thereof and if no required consent or novation to such sale has been obtained, then at [Giuliani Construction’s] election and in its sole discretion, such Contract shall not be sold, but [Giuliani Construction] shall act as agent and/or subcontractor for [appellant] in order to obtain for [Giuliani Construction] the benefits under such obligation or instrument.

(*Id.* at 6)

The agreement also provided in part in article 6.9, Consents, that:

All consents and approvals necessary to insure that [Giuliani Construction] will continue to have the same rights in respect to the Purchased Assets and Assumed Liabilities as [appellant] had immediately prior to the consummation of the transaction contemplated hereunder shall be sought, specifically the parties hereto, will request that [sic] the Government, a party to Contracts, enter into a novation agreement with the parties hereto.

(*Id.* at 15)

The agreement further provided in article 6.6, Opinion of counsel, that “Herman M. Braude, Esq. of Braude & Margulies, P.C., [was] counsel to the Parties.” (*Id.* at 14)

By letter dated 20 October 1997, Mr. Braude forwarded a novation agreement and numerous explanatory attachments to the contracting officer “for execution as you are the Responsible Contracting Officer, as defined by 48 C.F.R. 42.1202.” (R4, tab 46 at 1) Following receipt of the novation agreement, however, both parties exchanged voluminous correspondence for several months regarding numerous change order, contract administration and technical issues. (R4, tabs 48, 49, 51 through 69, 71 through 81) It was not until 24 February 1998 that the contracting officer replied. He asserted that appellant’s “assignment of subject contracts to [Giuliani Construction] occurred and was effective on September 30, 1997.” (R4, tab 82 at 1) He opined that appellant “likely has violated the Anti-Assignment Act” but stated that “[i]t is presently being considered whether it is in the Government’s best interests to waive this apparent violation of the Act.” (*Id.*) He requested appellant and Giuliani Construction to provide balance sheets and other information to be used “to determine whether or not approval of the novation agreement is in the Government’s best interest.” (*Id.*)

Mr. Braude responded to the contracting officer by letter dated 3 March 1997. He stated that “[t]he proposed transfer is not an assignment. No assignor/assignee relationship was established. Rather, this transfer involves a sale of assets as described in FAR 42.1204.” (R4, tab 83 at 1) He also disputed that appellant was obligated to seek prior approval of the proposed transfer under FAR 42.1204 (c). (*Id.* at 1-2) Quoting articles 2.2 (c) and 6.9 of the asset purchase agreement, Mr. Braude further stated that “if the Government declines to enter into the Novation Agreement, then it is [Giuliani Construction’s] intention to elect that the subject contracts not be sold and there is no transfer.” (*Id.* at 2)

It is undisputed that “the contracting officer never approved of the transfer [in the asset purchase agreement] or executed any required novation.” (Memorandum In Support of Respondent’s Motions to Dismiss For Lack of Jurisdiction And/Or Standing And to Preclude The Law Firm of Braude & Margulies From Participation In This Matter [First Motion] at 4 n. 2) In addition, appellant has tendered an uncontroverted affidavit from its president stating that “[t]he Contracting Officer’s refusal to approve the Novation Agreements stopped the transfer of assets as proposed and neither [appellant] or [Giuliani Construction] carried out the transfer.” (Affidavit of Joseph Guiliani, ¶ 6)

By decision dated 6 May 1998, the contracting officer notified appellant that he was terminating the contract for default, asserting that appellant had failed to prosecute the work, endangered performance and failed to complete the work within specified timeframes. (R4, tab 2 at 1) The contracting officer also concluded that appellant had breached the contract by violating the Anti-Assignment Act, 41 U.S.C. § 15. (*Id.* at 4, 5) This timely appeal followed.

DECISION

1. Motion to Dismiss for Lack of Jurisdiction Due to Assignment

Respondent's motion to dismiss for lack of jurisdiction due to assignment rests upon two alternative propositions. The first is that appellant's "transfer of the Contract to [Giuliani Construction] violated the Anti-Assignment Act [and hence] the Government's termination of the Contract pursuant thereto was proper and dismissal of this Appeal [for lack of jurisdiction] is warranted." (First Motion at 3) The second proposition is that, if appellant "properly effected transfer of the Contract to [Giuliani Construction], then this Appeal must still be dismissed because [appellant] relinquished its interest in the Contract and thereby lacks standing to prosecute the Appeal." (*Id.*)

We deny the motion. We treat it as one for summary judgment because matters beyond the pleadings have been presented to us and not excluded and because, in part, the motion does not involve our jurisdiction but the validity of an alternative ground for sustaining the termination for default. We apply the familiar precept that a movant's burden on summary judgment is to demonstrate that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *E.g., Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). In determining whether there is a genuine issue of material fact, we resolve all doubts in favor of the non-movant. *E.g., Lemelson v. TRW, Inc.*, 760 F.2d 1254, 1261 (Fed. Cir. 1985).

With respect to the first proposition, we reject respondent's argument that we lack jurisdiction because there was "an improper novation [that] renders [the] contract void." (First Motion at 3) The present record includes articles 2.2 and 6.9 of the asset purchase agreement, as well as Mr. Braude's statement in his 3 March 1997 letter that "if the Government declines to enter into the Novation Agreement, then it is [Giuliani Construction's] intention to elect that the subject contracts not be sold and there is no transfer." In addition, the record includes the uncontroverted affidavit of appellant's president stating that neither appellant nor Giuliani Construction "carried out the transfer" of assets contemplated by the agreement. Regardless of whether the contemplated transaction was a sale of assets or an assignment, we cannot conclude that respondent has met its burden on summary judgment in light of these statements.

With respect to respondent's second proposition, we reject the argument that appellant lacks standing. Respondent insists that appellant and Giuliani Construction "actually executed the Asset Purchase Agreement on September 30, 1997 and the agreement was effective as of that date. . . . Consequently, [appellant] had no interest in the subject contract after September 30, 1997." (First Motion at 7) We cannot say that appellant "had no interest" in the contract after that date, inasmuch as the present record reflects extensive correspondence between the parties regarding change order, contract administration and

technical issues even after receipt of appellant's proposed novation agreement in October 1997. We can say, however, that we have before us a timely appeal from a default termination brought by the "party to a Government contract other than the Government" to which the final decision terminating the contract for default was addressed.* 41 U.S.C. § 601 (4).

2. Motion for Disqualification of Appellant's Counsel

Respondent's motion to disqualify Mr. Braude and his firm is based upon Rule 1.7 (a) of the District of Columbia Rules of Professional Conduct, which provides that "[a] lawyer shall not represent a client with respect to a position to be taken in a matter if that position is adverse to a position taken or to be taken in the same matter by another client represented with respect to that position by the same lawyer." Respondent tells us that, inasmuch as Mr. Braude represented both appellant and Giuliani Construction with respect to the asset purchase agreement, "there is a substantial likelihood that [he] will be forced to take positions or make representations that are materially adverse to one client or another." (First Motion at 10)

We deny the motion. As we said in *Gaffney Corporation*, ASBCA Nos. 39740 *et al.*, 96-1 BCA ¶ 28,060 at 140,123-24 n. 1, *aff'd on reconsid.*, 96-1 BCA ¶ 28,138, *rev'd on other grounds*, 108 F.3d 1391 (Fed. Cir. 1997) (table), "[w]e know of no precedent for enforcing state Canons of Ethics in ASBCA proceedings." In any event, while respondent has proffered speculation, it has made no showing that, in fact, appellant will take adverse positions to Giuliani Construction in this appeal.

3. Motion to Dismiss for Failure to State A Claim For Which Relief Can Be Granted

Respondent's motion to dismiss for failure to state a claim on which relief can be granted rests upon the proposition that "Appellant's complaint is premised entirely upon conclusions of law and omits facts central to its asserted claims." (Memorandum in Support of Respondent's Motion to Dismiss for Failure to State a Claim For Which Relief Can Be Granted [Second Motion] at 3)

We deny this time-wasting motion. Reading the complaint as a whole, we cannot say that it is deficient when measured against either our Rule 6 (a) or Fed. R. Civ. P. 8 (a). The factual underpinnings of appellant's position can be obtained through discovery.

* Respondent's argument is not logically consistent. If the contracting officer addressed his decision terminating the contract for default to someone other than the contractor, the validity of that decision would be in doubt.

CONCLUSION

Respondent's motions are denied.

Dated: 14 February 2000

ALEXANDER YOUNGER
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

RICHARD SHACKLEFORD
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 No. 51672, Appeal of Giuliani Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

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