

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Tiger Enterprises, Inc.) ASBCA Nos. 57974, 58313
)
Under Contract No. FA3030-10-P-0026)

APPEARANCE FOR THE APPELLANT: Ms. Lillian Mauldin
President

APPEARANCES FOR THE GOVERNMENT: Col Jennifer L. Martin, USAF
Air Force Chief Trial Attorney
Christopher S. Cole, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE CLARKE

Tiger Enterprises, Inc. (Tiger) contracted with the Department of the Air Force to provide washers and dryers on a lease basis and perform repair services. Tiger seeks lease payments not furnished to it. The parties elected to submit the appeals under Board Rule 11 on the record. We have jurisdiction pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109.

FINDINGS OF FACT

1. Tiger, a North Carolina certified minority/woman owned small business, obtained award of eight contracts from the Departments of the Air Force, Army, and Navy between 2001 and 2006 for the lease of washers and dryers (supp. R4, tab 107 at 2-3 of 133). During fall of 2007, Tiger obtained the award of five additional contracts for the lease of washers and dryers: Naval Air Station Jacksonville, Florida; Hurlburt Air Force Base, Florida; Goodfellow Air Force Base, Texas; Seymour Johnson Air Force Base, North Carolina; and Dover Air Force Base, Delaware (supp. R4, tab 107 at 8, 121 of 133). To finance the five additional contracts, in December of 2007, Tiger entered into an agreement, which was referred to as a "PURCHASE AGREEMENT," with Anderson Funding Group LTD., Inc. (AFG) in which Tiger agreed to assign all contract payments and equipment collateral (washers and dryers) for all five contracts to AFG in exchange for furnishing of \$1.2 million to purchase the necessary equipment, i.e., finance its performance of the five contracts (supp. R4, tabs 104, 107 at 8-12, 121 of 133) (2007 Purchase Agreement). The Goodfellow Air Force Base (AFB) contract was No. FA3030-08-C-0001 (0001 Contract) (supp. R4, tab 107 at 10, 120 of 133).

2. The 2007 Purchase Agreement assigned title to the washers and dryers being leased to the military by Tiger to AFG (Tiger “sells and assigns to AFG all its rights, title and interests in and to the Equipment”) (supp. R4, tab 104 at 3, ¶ 2.1). The 2007 Purchase Agreement defined “EQUIPMENT” as:

All of the goods enumerated on the implementing Delivery Schedule which Equipment is leased by Vendor [Tiger] to Lessee [government] pursuant to a Contract....

(Supp. R4, tab 107 at 18 of 133, ¶ 1.4) The 2007 Purchase Agreement also assigned “all rights, title and interests in the Lease Payments as specifically identified in the Delivery Schedule” to AFG (supp. R4, tab 104 at 2, ¶ 2.1).

3. The 2007 Purchase Agreement stated a Delivery Schedule was to be executed by and between the parties for each transaction identifying the specific matters of purchase, including the Contract, Equipment and Lease Payments (supp. R4, tab 107 at 18, ¶ 1.3, at 27, ¶ 9.6). The Delivery Schedule with respect to Contract 0001 stated it was “issued pursuant to the Purchase Agreement between the parties dated December 1, 2007”; the terms governing it were “CONTAINED IN THE [parties’ 2007] PURCHASE AGREEMENT,” it authorized AFG to “prepare and file in all applicable jurisdictions UCC financing statements with respect to the Equipment, and the Lease Payments, including any amendments to same, without the Vendor’s [Tiger’s] authentication, to the extent permitted by applicable law,” and:

The Lease Payments assigned are: The monthly Contract Payment due under this Agreement is \$9,412.35 for Thirty-six (36) payments, commencing March 1, 2008. Payments received under the Contract (e.g. maintenance) not associated with the Lease Payments shall be remitted to Tiger Enterprises, Inc. upon receipt.

(Supp. R4, tab 107 at 30-31 of 133)

4. The 2007 Purchase Agreement defined “LEASE PAYMENTS” as:

The amounts payable by the Lessee under a Contract for Equipment, including...any renewals or extensions...and all payments made by the Lessee as a result of any purchase option contained in the Contract.... [Emphasis added]

(Supp. R4, tab 104 at 1, ¶ 1.5) The 2007 Purchase Agreement defined “CONTRACT” as:

The Prime Contract including all modifications, amendments or **supplements thereto, wherein Vendor [Tiger] leases Equipment to the Lessee [government]**, and the Lessee [government] agrees to pay for such Equipment **pursuant to any type of Lease**. [Emphasis added]

(Supp. R4, tab 104 at 1, ¶ 1.2)

5. The 2007 Purchase Agreement provided that AFG may assign its rights, title and interests in the Equipment listed on a Delivery Schedule and all rights to receive further lease payments to another party (supp. R4, tab 107 at 27 of 133, ¶ 9.7), and that the Equipment repurchase rights of Tiger were addressed in the Delivery Schedule (*id.* at 19 of 133, ¶ 2.3). The Delivery Schedule with respect to Contract 0001 stated that Tiger “may repurchase the Equipment for the amount listed in the Outstanding Balance Table” upon receipt by AFG of any and all of payments due it under the 2007 Purchase Agreement (*id.* at 31 of 133). (At the end of a contract lease term and repayment to the financing institution of monies due, Tiger could repurchase the washers and dryers and then sell the used machines to apartment building owners for 15% to 50% of their original cost, thereby making a significant profit on the transaction if the outstanding balance was low or zero (*id.* at 121 of 133)).

6. Approximately three months after executing the 2007 Purchase Agreement and agreeing to provide financing for Tiger’s contracts, AFG entered into another “PURCHASE AGREEMENT” (2008 Purchase Agreement) with Chain Bridge Bank of McLean, Virginia (Bank), assigning to the Bank all its rights to the collateral under the 2007 Purchase Agreement with Tiger, including all Equipment and Contract payments (supp. R4, tab 107 at 19, 95 of 133). AFG thereby undertook to “cause the Government to pay the Contract Payments directly to [Chain Bridge Bank], as and when the same shall be due and payable under the Lease” (supp. R4, tab 107 at 95 of 133, ¶¶ II(C), III(C)). The 2008 Purchase Agreement defined “Lease” as “that certain Prime Contract #...0001 dated December 17, 2007 between the Government and Tiger, and all modifications, **supplements and replacements to the foregoing**” (*id.* at 92 of 133) (emphasis added).

7. By a “CONSENT TO ASSIGNMENT” dated 6 February 2008, Tiger provided its express consent to assign Goodfellow lease payments to the Bank (R4, tab 17 at 17-10, 17-11; supp. R4, tab 106). The Consent to Assignment referenced the 2007 Purchase Agreement and the “Delivery Schedule TE-GOOD-001” dated 8 December 2007 between Tiger and AFG (R4, tab 17 at 17-10; supp. R4, tab 106 at 1, tab 107 at 42-43 of 133). The Consent to Assignment was followed by an “INSTRUMENT OF ASSIGNMENT” assigning all payments to the Bank on Contract 0001 (R4, tab 17 at 17-12; supp. R4, tab 106 at 3, tab 107 at 78-82). The Bank notified the Department of the

Air Force Contracting Officer (CO) for Contract 0001 of this assignment, providing her with copies of a UCC Financing Statement stating it covered the following collateral:

Description of Collateral:

All of the Debtor's right, title and interest in, to and under the following, whether now existing or hereafter acquired (all of which are herein collectively called the "Collateral"):

(1) all monies due and to become due to the Debtor pursuant to the Contract

....

(4) to the extent not otherwise included, all proceeds of any or all of the foregoing, whether existing on the date hereof or arising hereafter.

As used herein, the following terms have the following meanings:

"Contract" means that certain Contract No. FA3030-08-C-0001 dated December 17, 2007, between the Debtor [Tiger] and the 17th Contracting Squadron/FA3030, and all modifications to the foregoing, **and all instruments and agreements executed and delivered, or to be executed and delivered, by any person in connection therewith, together with all amendments, supplements and replacements to any of the foregoing.** [Emphasis added]

(R4, tab 17 at 17-15, 17-16; supp. R4, tab 107 at 86-87 of 133) The Assignment was incorporated into Contract 0001 by modification on 24 March 2008 (supp. R4, tab 109).

8. Thereafter, the Air Force made its payments to the Bank for Contract 0001 for the lease of washers and dryers at Goodfellow AFB, rather than to Tiger, pursuant to the assignment (*see* R4, tabs 17, 69, 77, 88; supp. R4, tab 109). All options existing under Contract 0001 (including the six-month extension of services) were exercised by the Air Force and the performance period for the contract was set to expire on 31 March 2010. While the Air Force issued a competitive solicitation necessary to award another contract for the lease of washers and dryers at Goodfellow AFB, two bidders filed protests precluding award of a new contract allowing continuous lease of washers and dryers in accordance with the Competition in Contracting Act. Because many of the base

personnel were not allowed to leave the base and there were no laundry facilities near the base, “[t]he loss of laundry services [would] significantly impact and degrade the overall health, welfare, and quality of life” of more than 2,000 students of the 17th Training Wing” at Goodfellow, potentially impacting the base’s training mission and the readiness of the Air Force. To maintain the continued availability of washers and dryers at Goodfellow, contracting officials prepared and executed a Justification and Approval (J&A) for the entry into a sole source “non-competitively” procured “bridge contract” with the existing contractor, Tiger, for a term of several months pending resolution of the bid protests, thereby “effectively” extending the existing washer and dryer contract until a contract could be awarded in accordance with the Competition in Contracting Act. This short-term “bridge” contract used the same performance work statement (PWS) as Contract 0001 and was justified on the basis the services were “deemed to be available only from the original source in the case of a follow-on contract for the continued provision of highly specialized services,” citing 10 U.S.C. § 2304(c)(1) and Federal Acquisition Regulation (FAR) 6.302-1. The Air Force stated the “incumbent contractor is the only available source to immediately continue this service during the interim period without mission degradation” and “[t]here are no other current contract vehicles to facilitate the use of another source.” (R4, tab 18)

9. While paragraph 3.2 of the PWS for Contract 0001 required removal of the washers and dryers from Goodfellow AFB no later than 10 April 2010 and the Bank had arranged to sell the washers and dryers at Goodfellow to Select Laundry, LLC (supp. R4, tabs 110, 111, 115 at 38, tab 116 at 2), the Bank consented to allowing the Equipment to remain at Goodfellow for continued use on the “bridge contract” with Tiger (R4, tab 17 at 17-1). By email, the Bank asked Air Force contracting officials to “[p]lease be certain to include [the Bank] as the NOA for all payments under th[e] Existing and Bridge Contract” and again provided the Air Force with a copy of Tiger’s 2008 Consent To Assignment and Instrument of Assignment and the Bank’s 2008 Notice of Assignment to the Air Force (*id.* at 17-1, 17-10, 17-12, 17-14).

10. The Air Force prepared a “bridge contract” for continued lease of the washers and dryers located at Goodfellow AFB, Contract No. FA3030-10-P-0026 (Bridge Contract) (R4, tab 1), and that document “was released unilaterally” by the Air Force on 1 April 2010 (R4, tab 23). While Air Force contracting officials prepared a modification of the Bridge Contract for signature by Tiger expressly recognizing the Bank as payee under the Bridge Contract pursuant to an assignment of claim, Tiger did not sign the modification despite repeated reminders to do so by the Air Force (R4, tabs 9-11, 17, 21, 64, 78, 80, 81, 92, 93). The Air Force attempted to have Tiger perform maintenance work on the washers and dryers required by the PWS for both Contract 0001 and the Bridge Contract, but Tiger did not perform that work. The Bank then arranged for others to perform the required work, apparently at its own expense. Due to the lack of working Equipment, the Air Force contended it was entitled to pay less than Tiger billed it and declined to pay invoices submitted by Tiger under the Bridge Contract for the full lease

amount. (R4, tabs 25, 33, 34, 36, 46, 58, 59, 67, 77, 78, 88-90; supp. R4, tab 113) During August 2010, the Bridge Contract lease term expired and the purchaser of the washer and dryer equipment from the Bank removed the machines from Goodfellow AFB (R4, tabs 85, 86).

11. On 12 August 2011, Tiger submitted a claim to the Air Force's CO in the amount of \$46,822.25 for payments deemed due to it under the Bridge Contract (R4, tab 101). By final decision dated 4 November 2011, the CO denied Tiger's claim (R4, tab 102). Tiger then filed an appeal with this Board which was docketed as ASBCA No. 57974. During June of 2012, the CO withdrew his November 2011 final decision and issued a new decision denying Tiger's claim based upon a differing rationale (R4, tab 103). Tiger filed another appeal with respect to the new decision, which this Board docketed as ASBCA No. 58313.

DECISION

In its claim, Tiger asserts that it received no payments under the Bridge Contract and that the overall total owed to it by the Air Force for the performance of the Bridge Contract was \$46,822.25. Tiger contends in its briefs that the issue in the appeals is simple – the Air Force entered into a contract with Tiger for services and received the services that Tiger contracted to provide, but failed to pay Tiger for the services provided in accordance with the parties' contract (app. resp. at 1-2; app. sur-reply at 1, 3). According to Tiger, it is entitled to receive payment for the months of April, May, June, July, and August under the Bridge Contract for the lease of washers and dryers provided at Goodfellow AFB.

In pursuing its claim and appeals here, however, Tiger fails to recognize a very important fact – the Air Force was on notice that the washer and dryer equipment at Goodfellow and proceeds from lease of that equipment were subject to an assignment by Tiger to the Bank pursuant to a 2008 Purchase Agreement, which provided financing for various washer and dryer lease contracts Tiger had entered into with the government. The terms of the 2008 Purchase Agreement (and its 2007 predecessor between AFG and Tiger which are referenced in the 2008 Purchase Agreement) expressly assign “[t]he amounts payable by the Lessee [government] under a Contract for Equipment” to the “Bank,” define “CONTRACT” as “that certain Prime Contract #...000...between the Government and Tiger, **and all modifications, supplements and replacements to the foregoing,**” and define “EQUIPMENT” as the washers and dryers located at Goodfellow AFB pursuant to Contract 0001 identified in a Delivery Order with respect to Contract 0001. (Emphasis added) The Bridge Contract was a “supplement” or “replacement” to Contract 0001 within the terms of the assignment. Tiger obtained the Bridge Contract (without having the award of a contract for the services specified competed in accordance with the Competition in Contracting Act) only because it was the “existing contractor” under Contract 0001 and there was no other legal means by which the Air Force could

procure the needed services in the necessary time. Essentially, the Bridge Contract was a short-term extension of Contract 0001 using the same performance work statement and Equipment as Contract 0001 due to exigent circumstances arising from the filing of bid protests regarding the follow-on procurement for Contract 0001.

The assignment to the Bank pursuant to the 2008 Purchase Agreement was consented to by Tiger, adhered to by the Air Force for years during performance of Contract 0001, and had not been released. As found above, prior to performance of the Bridge Contract, the Bank expressly reminded the Air Force of the assignment and its applicability. The Air Force therefore clearly was on notice that the washer and dryer equipment at Goodfellow AFB to be utilized for the Bridge Contract lease and proceeds from the lease of that equipment were the subject of an assignment to the Bank. *See, e.g., Tuftco Corp. v. United States*, 614 F.2d 740 (Ct. Cl. 1980); *Riviera Finance of Texas v. United States*, 58 Fed. Cl. 528 (2003). An assignment of the right to be paid the proceeds of a contract imposes an obligation on the government once it has received notice of the assignment to make payments under the contract in accordance with that assignment. The government can be held liable on that obligation to the assignee if it makes payments to the assignor. *D & H Distributing Co. v. United States*, 102 F.3d 542, 547 (Fed. Cir. 1996); *Central Nat'l Bank v. United States*, 91 F. Supp. 738, 740-41 (Ct. Cl. 1950) (government having received timely notice of assignment paid the assignor at its peril). While Tiger declined to execute a modification to the Bridge Contract formally recognizing the Bank as payee on the Bridge Contract apparently due to ongoing disputes between the Bank and Tiger, its refusal to do so does not obviate the existence of its assignment of washer and dryer Equipment lease proceeds to the Bank. *See Produce Factors Corp. v. United States*, 467 F.2d 1343, 1351 (Ct. Cl. 1972) (because the Assignment of Claims Act was enacted solely for the benefit of the government, government has option to accept an assignment not complying with Act); *Maffia v. United States*, 163 F. Supp. 859, 862 (Ct. Cl. 1958) (same); *Riviera Finance*, 58 Fed. Cl. at 530 (although tribunals examine a variety of factors to determine if government has recognized an assignment, including whether the CO has modified a contract to change payee to assignee, all such factors need not be present for government to have recognized assignment).

Because the Air Force is not seeking to set-off any of the monies to be paid under the Bridge Contract, it is a mere "stakeholder" with respect to those monies. In light of its notice of assignment of Equipment lease proceeds to the Bank, it therefore did not breach the Bridge Contract in declining to pay monies due for the washer and dryer Equipment lease to Tiger. In an advance decision (B-194945), 58 Comp. Gen. 619 (1979), the General Accounting Office (GAO) offered advice to an agency in a position similar to the Air Force here. There, a bank notified the CO that it was assignee of all of a contractor's accounts receivables. As evidence of the assignment, the bank submitted a Security and Assignment Agreement in which the contractor agreed to "grant a security interest in, sell, assign, transfer, deposit, pledge and set over to the Bank all its right, title

and interest in and to each and every account of the Undersigned now owned or hereafter arising and all moneys now due or hereafter to become due thereon.” The contracting agency informed the assignee bank that the assignment was not in compliance with the Assignment of Claims Act because it did not specifically refer to the government contract number at issue and predated award of that contract. Possessing documents tending to demonstrate the establishment of a line of credit extended to the contractor during the performance of the contract, the agency sought GAO’s advice because the earlier security agreement was deemed a “blanket” agreement covering a variety of security interests in the debtor’s current and future accounts receivable. As here, the agency seeking GAO advice was a mere “stakeholder” – there was no issue of a government set-off. GAO advised “[i]n such circumstances it is enough that the Government assure itself of the assignment’s authenticity and its applicability to [the] contract right involved here.” GAO stated, in accordance with the modern trend away from tying a particular loan to a particular security, the use of a revolving credit financing device has been regarded as acceptable under the Act. *Id.* (citing *Continental Bank & Trust Co. v. United States*, 416 F.2d 1296 (Ct. Cl. 1969)). GAO concluded the assignment should be recognized as an assignment under the Act by the agency. GAO added the assignee bank should be required to indemnify the government from any claims the contractor might make due to the controversy in the matter, and that it could be paid the contract monies at issue upon satisfaction of that requirement.¹

¹ In its opening brief, the Air Force expressly states, “[a]s the owner of the equipment, and per its [2008] contract with Tiger, the Bank and not Tiger is owed payment for the use of the equipment” during the Bridge Contract. It requests that we hold there was a valid assignment of contract proceeds and asserts if we hold otherwise it may be placed “in the position of paying twice for services rendered.” (Gov’t br. at 18, 24) We have held there was an assignment by Tiger to the Bank recognized by the Air Force which has not been released, and presumably now the Air Force will make payments for services it received to the Bank in accordance with GAO’s guidance to other agencies similarly situated.

CONCLUSION

For the reasons stated above we deny Tiger's appeal.

Dated: 8 October 2013



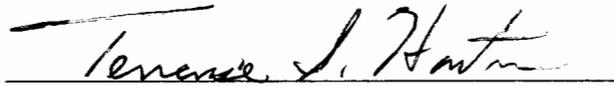
CRAIG S. CLARKE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur



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



TERRENCE S. HARTMAN
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 57974, 58313, Appeals of Tiger Enterprises, Inc., rendered in conformance with the Board's Charter.

Dated:

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