ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Fireman's Fund Insurance Company	)	ASBCA No. 50657
	)	
Under Contract No. N62472-90-D-0037	)	

APPEARANCE FOR THE APPELLANT: John D. McKenna, Esq.
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New York, NY

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
Navy Chief Trial Attorney
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Washington, DC

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON RESPONDENT'S MOTION TO DISMISS FOR
LACK OF JURISDICTION AND APPELLANT'S
MOTION TO STRIKE

Respondent moves to dismiss for lack of jurisdiction such of appellant's claims as arose prior to (but not those which accrued after) the execution of a takeover agreement between respondent and Fireman's Fund Insurance Co., the original contractor's surety. Appellant argues that it has standing to appeal pursuant to the Contracts Disputes Act (CDA) and by virtue of the doctrine of equitable subrogation.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. In 1988, the Navy awarded Summit General Contracting Corp. (Summit) Contract No. N62472-88-C-0026 (contract 26) to construct the Naval Telecommunications Center (NTC) on Staten Island, New York. As awarded, the contract completion date was 9 December 1989. (R4, tab 1)

2. Fireman's Fund Insurance Co. (Fireman's) provided performance and payment bonds, executed on 6 October 1988, in the amounts of $749,000 and $374,500, respectively, for contract 26 (R4, tab 1). In conjunction with contract 26's bonds, Summit executed a General Indemnity Agreement (GIA) on May 31, 1988, which defined the surety as Fireman's (among other insurors) and the "Indemnitors" as the "undersigned . . .

Summit General Contracting Corp. [and] Summit Waterproofing & Restoration Corp.," and provided:

> The Indemnitors hereby assign . . . to the Surety (effective as of the date of each such Bond, but only in the event of default, breach or failure [with respect to the contract for which the bond is given]), as collateral security, to secure the obligations hereunder and any other indebtedness and liabilities of the Indemnitors to the Surety, all of their rights under the contracts, referred to in such Bonds, including their right, title and interest in and to . . . all actions, causes of actions, claims and demands whatsoever which the Principal may have in anyway arising out of or relating to such Bond, or contract covered by such Bond.

The claims assigned to Fireman's are those of the "Principal," which the GIA did not define. Respondent was not a party to the GIA. (McKenna affid., ex. A) The record contains no evidence that respondent was aware of, or consented to, the GIA.

3. After Summit failed to complete contract 26 by its scheduled completion date, on 11 December 1989 respondent informed Summit that liquidated damages would be assessed (R4, tab 9). Summit eventually abandoned contract 26 (R4, tab 13). On 16 January 1990, respondent terminated contract 26 for default (mot., attach. 1).

4. On 17 April 1990, Fireman's and respondent entered into a takeover agreement, designated "contract N62472-90-C-0037" to complete contract 26 (R4, tab 15). The takeover agreement incorporated the provisions, clauses, plans and specifications of the "defaulted contract," set a completion date of 15 August 1990, and provided as follows:

> 2. b. Any unpaid amounts earned by the defaulted contractor including retained percentages and progress estimates for work accomplished prior to termination, shall be subject to claims by the Government against the defaulted contractor under the defaulted contract, except to the extent that such unpaid earnings may be required to permit payment to the completing surety of its actual costs and expenses incurred in the completion work, exclusive of its payments and obligations under the Payment Bond given in connection with the contract.

Summit was not a party or signatory to the takeover agreement. The takeover agreement did not mention the GIA or assignment of any Summit claim to Fireman's. (R4, tab 15)

6. Fireman's completed the project on 13 March 1991. Modification No. P00003 extended the contract completion date by 80 days to 2 November 1990. Modification No. P00008 assessed liquidated damages totaling $151,600 for 379 days of delay at the rate of $400 per day prescribed in contract 26 for the following periods: 9 December 1989 to 15 August 1990 and 3 November 1990 to 13 March 1991. (R4, tabs 1, 2)

7. On 30 August 1993 Fireman's submitted a properly certified claim to the contracting officer which it later amended on 9 October 1995 (R4, tabs 26, 31). Fireman's "request for an equitable adjustment and/or rescission of assessed liquidated damages," as so amended, included the following six claims:

(Claim I[*]): EXCESSIVE SUBMITTAL REVIEW DELAY CLAIM - Fireman's contended that respondent's review of 33 submittals delayed contract completion. The alleged delay in reviewing the first 15 of those submittals arose before the takeover agreement was executed (Claim I.A); the alleged delay in reviewing submittals numbered 16 to 33 arose after the date of the takeover agreement (Claim I.B).

(Claim II): UNIT SUBSTATION DELAY - Claim II's alleged delays occurred after the date of the takeover agreement. Respondent's motion to dismiss does not apply to Claim II. (Mot. at 11)

(Claim III): PILE DRIVING DELAY - Fireman's alleged that respondent caused delays due to excessive review time regarding the pile driving records and surveys. All Claim III events occurred in April-May 1989, before the date of the takeover agreement.

(Claim IV): WINTER PROTECTION AND HEATING COSTS - Fireman's contends that the need for winter protection and heating during a 17-week period between December 1989 and March 1990 was a result of the substantial delays experienced during the pile driving phase of the project. All Claim IV events occurred prior to the takeover agreement.

(Claim V): SITE OVERHEAD DELAY COSTS - This claim is for overhead costs on the direct costs alleged in Claims I, II, and III. Such costs allocable to events arising before the takeover agreement are Claim V.A, and those allocable to events thereafter are Claim V.B.

(Claim VI): HOME OFFICE OVERHEAD DELAY COSTS - This claim is for recovery of increased home office overhead costs for 226 days of alleged delay arising

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[*] Appellant did not number its claims. For purposes of clarity, we added numbers.

from Claims I, II, and III. Such costs are allocable to those claims which arose before the takeover agreement (Claim VI.A) and to those which arose thereafter (Claim VI.B).

8. The contracting officer's 17 December 1996 final decisions denied Fireman's claim in its entirety (R4, tab 32). Fireman's filed a timely appeal to the ASBCA.

Parties' Contentions

Respondent's answer to appellant's complaint alleged that the appellant's claim and appeal were not prosecuted timely, appellant's claim certification was not valid, and the Board lacks jurisdiction to entertain claims that arose before the surety entered into the takeover agreement. On 21 August 1997 appellant moved to strike those allegations from respondent's answer. On 27 August 1997 respondent stated that its denial "that the claim and appeal were prosecuted in a timely manner" was intended to preserve its right to pursue a laches defense "at the hearing." On 27 October 1997 respondent withdrew its challenge to Fireman's claim certification. This leaves only one issue to be resolved: Fireman's standing to take this appeal as to claims arising prior to the takeover agreement.

Respondent moves to dismiss those claims that arose before the takeover agreement for lack of Board jurisdiction to adjudicate them. Respondent argues that Fireman's does not have standing to pursue such claims because Summit did not assign to Fireman's the right to pursue those claims in accordance with the assignment of claims statutes, respondent has not waived compliance with such statutes, and the doctrine of equitable subrogation does not allow a surety to bring equitable adjustment claims arising before execution of a takeover agreement.

Fireman's argues that it has standing to prosecute pre-takeover agreement claims by virtue of the CDA and the doctrine of equitable subrogation. Appellant asserts that Summit assigned all its claims to Fireman's in the GIA, or alternatively, respondent consented to the GIA by novation; and the doctrine of equitable subrogation gives Fireman's standing to pursue claims relating to the defaulted contract.

DECISION

The Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, established Board jurisdiction over appeals concerning claims by and against a "contractor," defined as "a party to a Government contract other than the Government." 41 U.S.C. § 601(4); *see Admiralty Constr., Inc., by National American Ins. Co. v. Dalton,* 156 F.3d 1217, 1220 (Fed. Cir. 1998). Fireman's entered into a takeover agreement with the Government on 17 April 1990 (SOF ¶ 4). The parties do not dispute that Fireman's is a "contractor"

with standing to present claims arising under the takeover agreement. *See, e.g., Carchia v. United States*, 485 F.2d 622, 628-29, 202 Ct. Cl. 723 (1973), cited in *Admiralty Constr., supra*, at 1221.

With respect to CDA claims for affirmative relief (as distinct from a claim for the contract balance held by the Government as a "stakeholder") arising before a surety takeover agreement, two lines of precedent may be discerned: (1) When a terminated contractor assigns such claims to the surety to which assignment the contracting officer consents, or incorporates such an assignment in novation or takeover agreement executed by the contracting officer, the surety has standing to prosecute such claims before the Board. *See Insurance Company of the West*, ASBCA No. 35253, 88-3 BCA ¶ 21,056 at 106,347 (takeover agreement assigned to surety the right to pursue the defaulting contractor's claims against the Government; surety had standing). (2) Absent such an assignment, novation, or takeover agreement incorporating the defaulting contractor's assignment, a surety lacks standing to prosecute claims for affirmative relief, since the proper party to bring such claim must have privity of contract with the Government at the time the claim arose. *See Engineering Technology Consultants, S.A.*, ASBCA Nos. 44237, 45277, 45302, 94-1 BCA ¶ 26,334 at 130,989-90 (without original contractor's assignment of pre-takeover claims, surety could not assert delay claim that arose prior to the takeover agreement).

Fireman's argues standing to pursue pre-takeover agreement claims based upon Summit's assignment of claims to Fireman's in the GIA. Alternatively, Fireman's asserts that if Summit's assignment violated the anti-assignment statutes, respondent consented to such assignment "by novation." (App. br. at 7) Neither of these arguments is sound.

The claims assigned to the surety by the GIA are those of the "Principal," which the GIA did not define, not of the "Indemnitors," defined as the "undersigned," which were "Summit General Contracting Corp." and "Summit Waterproofing & Restoration Corp." Thus, it is not evident that the GIA assigned any Summit claim at all. Whatever assignment the GIA contemplated occurred on 6 October 1988, the date Fireman's bonds were executed (SOF ¶ 2), before the 17 April 1990 execution of the takeover agreement, which placed Fireman's in privity of contract with respondent.

31 U.S.C. § 3727 prohibits the assignment of a claim or an interest in a claim against the United States other than to banks, trust companies or other financial institutions, and provides that an attempted assignment of a claim against the United States "shall be absolutely null and void." Summit attempted to assign its claims under the defaulted contract to Fireman's, which was neither a bank, trust company or financial institution, in violation of the aforesaid statutes. Such assignment is invalid as to the United States. Fireman's asserts that even if the assignment of claims by the GIA was void, the Government consented to the assignment by novation. The record contains no

evidence that respondent was a party to, aware of, or consented to, the GIA (SOF ¶ 2). Therefore, the GIA was not a novation for lack of the Government as a party thereto. *See* FAR § 42.1201. The takeover agreement did not mention the GIA or assignment of any Summit claim to Fireman's (SOF ¶ 4).

Fireman's final argument is that, based on the doctrine of equitable subrogation, it is subrogated to Summit's pre-takeover agreement claims. A surety has standing by equitable subrogation to claim funds held by the Government or improperly disbursed to a third party; recovery is limited to the amount of the contract balance. *Balboa Ins. Co. v. United States*, 775 F.2d 1158, 1161-63 (Fed. Cir. 1985); *Peerless Ins. Co.*, ASBCA No. 28887, 88-2 BCA ¶ 20,730 at 104,740. In this case, respondent is not a stakeholder nor has it disbursed funds to a third party. Fireman's claims an equitable adjustment in excess of the contract price for additional costs allegedly incurred by Summit under the defaulted contract. Absent a valid assignment of claims from Summit, as we have just held, Fireman's lacks standing to litigate claims which arose under the defaulted contract.

Accordingly, we deny Fireman's motion and we grant respondent's motion and dismiss Claims I.A, III, IV, V.A, and VI.A for lack of jurisdiction.

Dated: 28 February 2000

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

CARROLL C. DICUS, JR.
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. 50657, Appeal of Fireman's Fund Insurance Company, rendered in conformance with the Board's Charter.

Dated:

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