ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Security Insurance Co. of Hartford and	)	ASBCA No. 51813
National American Insurance Co.	)	
	)	
Under Contract No. F19650-92-C-0040	)	

APPEARANCES FOR THE APPELLANT: Robert G. Watt, Esq.
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APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
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MAJ Brian G. Koza, USAF
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OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal is brought by two sureties that completed performance under a takeover agreement following default by the prime contractor. The underlying claim includes elements that arose before the default termination of the original contractor for work performed by that contractor. The Government moves to dismiss for lack of standing the portion of appellants' allegations that arose before execution of the takeover agreement. Appellants oppose dismissal, and instead ask that we sanction the Government for pursuing the motion, which appellants contend is frivolous. For the reasons discussed *infra*, we deny the motion to dismiss and the request for sanctions.

FINDINGS OF FACT
FOR PURPOSES OF THE MOTION

1. On 10 August 1992, the Department of the Air Force (Air Force or Government) awarded Contract No. F19650-92-C-0040 (hereinafter sometimes "contract 0040") to Martech USA (Martech) at a price of $3,988,845. The contract called for the remodeling and renovation of 128 family housing units at Hanscom AFB, Massachusetts. As required by the contract and the Miller Act, 40 U.S.C. §§ 270a *et seq*., Martech furnished to the Government performance and payment bonds valued at $3,988,845 and $1,595,538, respectively. Appellants, Security Insurance Co. of Hartford and National American

Insurance Co., were co-surety on the bonds tendered by Martech. Appellants were not parties to the contract between Martech and the Air Force. On 14 September 1992, the Government issued Martech a notice to proceed. Martech had 600 calendar days to complete the project. (R4, tabs 1, 2, 41, 46)

2. In December 1993, Martech filed a petition for bankruptcy in the U.S. Bankruptcy Court for the District of Alaska (the Bankruptcy Court). Initially, Martech sought reorganization of its business pursuant to Chapter 11 of the Bankruptcy Code. However, the case subsequently was converted into a Chapter 7 liquidation proceeding. (App. supp. R4, tab C at 1, 3) At the time of its bankruptcy petition, Martech was engaged in approximately 70 bonded contracts with numerous public entities (app. supp. R4, tab A at ¶ 4). Appellants, in conjunction with other sureties that had executed bonds on behalf of Martech, initiated claims against Martech's estate in the bankruptcy proceeding (app. supp. R4, tab C at 1-3; Battley aff. at ¶ 4). The Bankruptcy Court appointed Mr. Kenneth W. Battley as trustee of the bankruptcy estate. (R4, tabs 26, 27; Battley aff. at ¶¶ 2-4) The Air Force, Hanscom AFB, was a creditor of Martech and received notice of proceedings (R4, tabs 26, 27). The Air Force worked with the U.S. Attorney to obtain relief from the automatic stay provision of the bankruptcy laws in order to default terminate Martech' s contract (R4, tab 42).

3. On 17 February 1994 the Bankruptcy Court issued an order granting relief from the automatic stay in a hearing where the Government was represented by the Air Force (R4, tab 91). On 18 February 1994, the Air Force terminated its contract with Martech for default. According to the termination notice, Martech had abandoned performance of the contract and had failed to proceed with the diligence necessary to ensure timely completion of the project. (R4, tab 1 at 91-92) There is no evidence, and we find, that Martech did not appeal or otherwise contest the default termination.

4. Following the default termination, on 24 May 1994, appellants and the Air Force entered into a takeover agreement whereby appellants agreed to complete the remaining work under the contract. Martech was not a party to the takeover agreement. Appellants engaged J.E. Murphy Contracting Co., Inc. to perform the actual contract work. (R4, tabs 1, 46, 85) The takeover agreement contains the following relevant provisions:

> 1. Obligee [Air Force] re-obligates all available contract balances under said Original Contract for the completion of the work in accordance with its terms as modified by this Agreement. Obligee hereby agrees it will pay directly to Surety, as the same shall become progressively payable in accordance with the payment provisions of said Original Contract, as modified by this Agreement, all sums to become due and payable upon and under said contract, including all unearned retainage percentages, and any and all other monies

> contracted to be paid thereunder (which Surety acknowledges allows for retainage) as would be or would have been payable to Principal [Martech] if there had been no default but in no event more than the contract amount, as modified in accordance with its terms.
>
> . . . .
>
> 12. . . . Regardless of Surety's assumption of the Original Contract Documents, Surety hereby expressly reserves any and all rights, equities and claims which Principal or Surety may have against Obligee arising out of its administration of the Original Contract, and any such rights, defenses and equities which are available to Surety by statute, under existing agreements and under law.

(R4, tab 1)

5. Early in 1995, appellants and other Martech sureties reached agreement with Mr. Battley to settle the sureties' claims against Martech's estate. The settlement was not effective unless approved by the Bankruptcy Court (app. supp. R4, tab C at ¶ 2). The Air Force was not a party to the settlement (app. supp. R4, tabs A, B, C; Battley aff. at ¶ 5). A motion was filed by the trustee on 11 October 1995 seeking a court order approving the settlement. A copy of the motion was provided to an Assistant U.S. Attorney. (App. supp. R4, tab B)

6. As part of the settlement, it was agreed that Martech's estate would be entitled to a 15% share of any recovery that the sureties managed to achieve from a lawsuit that the sureties had filed against the United States in the Court of Federal Claims (COFC) (app. supp. R4, tab C at ¶ 6). In their lawsuit, the sureties had asserted entitlement to funds withheld by the United States under various Martech contracts (app. supp. R4, tab A at ¶ 18; app. supp. R4, tab A at 3). The specific contracts at issue in the COFC litigation were listed in "Exhibit 1" attached to the settlement agreement (app. supp. R4, tab A at ¶ 6). The instant contract was not among those listed in Exhibit 1 (app. supp. R4, tab A at Exhibit 1).

7. With respect to Martech contracts not included in Exhibit 1, paragraph 6 of the settlement agreement provided that:

> . . . The Trustee relinquishes any claim to recoveries that the Sureties might obtain on contracts that the Sureties entered into takeover or tender agreements with the United States Government as set forth in paragraph 10. The Trustee has no share in the recoveries related to such contracts.

(App. supp. R4, tab C, at ¶ 6) Paragraph 10 of the agreement stated that:

> The Trustee acknowledges the Sureties are the holders of all contract rights and rights to recover under contracts that have been terminated and on which the Sureties entered into tender or takeover agreements with the United States. The Trustee will fully cooperate. . . . Except as provided for otherwise in this Agreement, the Trustee acknowledges that any right to recoveries on bonded contracts belongs to the Sureties. To facilitate the enforcement of the Sureties' rights and to the extent the Trustee's cooperation will not harm the estate, the Trustee agrees to sign specific assignments of claims, powers of attorney, consents or releases if requested by the Sureties, or, provide certifications needed to pursue claims against the Government and/or third parties.

(App. supp. R4, tab C at ¶ 10)

8. The settlement agreement made no direct reference to the instant contract. However, according to Mr. Battley:

> Through Paragraph 10 of the Settlement Agreement, I assigned to the Sureties all of Martech's claims under its bonded contracts, including the Hanscom Air Force Base contract at issue in this appeal.

(Battley aff. at ¶ 7)

9. On 11 October 1995, Mr. Battley asked the Bankruptcy Court to approve the settlement agreement between the sureties and Martech's estate. After observing that "appropriate notice having been given, and . . . no objections have been filed," the Bankruptcy Court endorsed the settlement, with the inclusion of minor clarifying language. In its order approving the settlement, the Bankruptcy Court stated that "the Trustee is hereby authorized and ordered to take any and all steps and to execute any documents necessary to effectuate the Settlement Agreement." (App. supp. R4, tabs A, B)

10. In July 1994, appellants submitted to the contracting officer a certified claim in the amount of $649,792.80 (R4, tab 47). The claim subsequently was amended to a total of $1,237,692 (R4, tabs 64, 72, 85). The claim sought relief, *inter alia*, for alleged delays and changes that occurred during Martech's performance of the contract (*id*.). A "fact-finding" meeting with the appellants on the claim was scheduled on 18 August 1994 (R4, tab 48). Another meeting involving the contracting officer and appellants was held on 9

September 1994 at which the parties agreed to exchange additional documentation (R4, tab 52). Appellants employed PI Associates Consultants (PI) to make additional presentations (R4, tab 54). The Air Force provided documentation to PI in January 1995 (R4, tab 55).

11. The Air Force directed negotiation of the claim to the Justice Department because of the suit filed in the COFC (R4, tab 61). This direction was subsequently withdrawn and discussions between appellants and the Air Force continued into April 1995 (R4, tabs 63, 64, 65). A DCAA audit was requested by the Air Force on 25 April 1995 (R4, tab 66). A 1 June 1995 meeting between the Air Force and appellants was canceled when the audit was not completed by that date (R4, tabs 67, 68). Documentation provided to DCAA on the sureties behalf (R4, tab 69) was deemed inadequate by DCAA in a 20 June 1995 report (R4, tab 70). A meeting was held with the Air Force and appellants thereafter (R4, tab 71).

12. A further written submission was forwarded to the Air Force by appellants on 4 August 1995 (R4, tab 72). The DCAA, based on their review of the claim, submitted a Suspected Irregularity Referral Form to, *inter alia*, Defense Procurement Fraud Unit and Air Force Office of Special Investigations (R4, tab 73). Settlement discussions with the Air Force and DCAA continued in January 1996 and further analysis of the claim was conducted (R4, tabs 74, 75).

13. By August 1996 the Justice Department was involved in negotiations and an offer was presented by appellants (R4, tab 77). Thereafter, the Air Force assessed appellants' offer and found it unsupported in a memorandum dated 28 October 1996 (R4, tab 78). A 25 November 1996 position paper attempting to further support appellants' position to the Justice Department was submitted (R4, tab 79) and found unacceptable in a 31 December 1996 Air Force analysis (R4, tab 80). A 26 March 1997 letter from appellants to the Justice Department forwarded additional support (R4, tab 81) and was again rejected by the Air Force in a 21 April 1997 analysis (R4, tab 82).

14. The Justice Department raised the Assignment of Claims Act sometime prior to 15 May 1997. Appellants responded with legal arguments in rebuttal in a 15 May 1997 letter, which is the last communication between appellants and the Justice Department in the record. (R4, tab 83) By memorandum of 13 June 1997 the Air Force questioned the Justice Department's conclusion that a fraud claim against appellants was not warranted (R4, tab 84). In a 12 November 1997 letter to the contracting officer appellants forwarded *inter alia,* the 15 May 1997 letter addressing the Assignment of Claims Act (R4, tab 85). A 25 November 1997 memorandum providing further DCAA analysis of the claim was forwarded to the contracting officer for the purpose of supporting a final decision (R4, tab 86). Air Force analysis continued into December 1997 (R4, tab 87).

15. The contracting officer denied all but $1,796 of the claim on 17 July 1998, and appellants timely appealed to this Board. The amount awarded was for a pre-takeover

agreement claim. (R4, tabs 88, 89) There is no evidence that Martech sponsored either the filing of the claim or the prosecution of this appeal. However, Mr. Battley, as representative of Martech's estate, has announced his support for appellants' right to pursue this matter (Battley aff. at ¶¶ 7-8). Mr. Battley indicates that he is prepared, upon request, "to execute a specific assignment to the Sureties of Martech's claims under the Hanscom Air Force Base Contract" (*id*.).

DECISION

The Government now moves to dismiss for lack of standing the portion of appellants' claims that arose during Martech's performance of the contract. The Government maintains that we have no jurisdiction to entertain these allegations because, at the time the causes of actions arose, appellants were not "contractors" within the meaning of the Contract Disputes Act of 1978 (CDA), as amended, 41 U.S.C. §§ 601 *et seq*. Rather, appellants were sureties on behalf of Martech, the prime contractor. (Finding 1) Since the Board's jurisdiction extends only to appeals brought by a "contractor," the Air Force contends that appellants' pre-takeover agreement allegations (hereinafter sometimes "Martech's claims") must be dismissed for lack of jurisdiction. Furthermore, the Government insists that appellants could not have acquired the right to prosecute claims which once belonged to Martech. Pursuant to the Assignment of Claims Act, 31 U.S.C. § 3727, a transfer of claims from a contractor to a surety generally is prohibited, unless the Government consents to that transfer. *E.g., United Pacific Ins. Co.*, ASBCA No. 52419, 01-1 BCA ¶ 31,296 at 154,507, on appeal *sub nom. United Pacific Ins. Co. v. Delaney*, Fed. Cir. No. 01-1242 ("*United Pacific I*"); *Fireman's Fund Ins. Co.*, ASBCA No. 50657, 00-1 BCA ¶ 30,802 at 152,070, *aff'd on recons.*, 00-1 BCA ¶ 30,905, on appeal *sub nom. Fireman's Fund Ins. Co. v. Pirie*, Fed. Cir. No. 00-1420 ("*Fireman's Fund*"). Here, the Air Force maintains it did not approve, or acquiesce to, the transfer of Martech's claims to appellants. Accordingly, the Government contends that any attempted transfer of claims would be barred by the Assignment of Claims Act. It also argues that the recent decision in *Insurance Company of the West v. United States*, 243 F.3d 1367 (Fed. Cir. 2001), divests us of jurisdiction as to portions of the claim involving equitable subrogation.

In response, appellants contend that the transfer of Martech's claims to appellants is exempt from the Assignment of Claims Act because it occurred by operation of law in the context of Martech's bankruptcy proceeding. Appellants also argue that, even if the Assignment of Claims Act is applicable, it was waived. Appellants next contend that the takeover agreement vests them with the right to assert claims which arose during Martech's performance. Finally, appellants urge us to reject the Government's argument that we do not have jurisdiction to consider equitable subrogation claims.

Rights Under the Takeover Agreement and
Applicability of the Assignment of Claims Act

We have addressed similar arguments that takeover agreements created standing in the recent past and rejected them in both *United Pacific I* and *Fireman's Fund*. We held: "[W]ithout an assignment by the contractor to the surety to which the contracting officer consents or some other agreement between the Government, the contractor and the surety amounting to an assignment, a surety lacks standing to pursue pre-takeover agreement claims." *United Pacific I* at 154,507. Citing the provision at finding 4, appellants assert that this takeover agreement specifically incorporates the terms of the original contract and expressly assigns to appellants the right "to receive any and all monies due the Principal as a result of its performance of work under the Contract." Thus, the argument concludes, appellants are entitled to pursue Martech's pre-takeover claims. (App. br. at 10, emphasis in original) Appellants would distinguish our holdings in *United Pacific I* and *Fireman's Fund* because, according to appellants, this takeover agreement assigns monies that would have been payable to Martech and Martech's claims have been assigned to appellants by operation of law. (App. br. at 10-11) Unlike contentions raised by the appellant in *United Pacific I* at 154,508-09, we do not understand appellants here to argue that their right to assert Martech's claims is incident to their suretyship status and the impairment thereof (*see* RESTATEMENT (THIRD) SURETYSHIP AND GUARANTY (1966) § 37). Rather, appellants assert rights allegedly arising from the takeover agreement and assignment of Martech's claims "by operation of law" or by waiver.

The Assignment of Claims Act, 31 U.S.C. § 3727, provides in relevant part:

> (a) In this section, "assignment" means --
>
> (1) a transfer or assignment of any part of a claim against the United States Government or of an interest in the claim; or
>
> (2) the authorization to receive payment for any part of the claim.
>
> (b) An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued. The assignment shall specify the warrant, must be made freely, and must be attested to by 2 witnesses. The person making the assignment shall acknowledge it before an official who may acknowledge a deed, and the official shall certify the assignment. The certificate shall state that the official completely explained the assignment

> when it was acknowledged. An assignment under this subsection is valid for any purpose.
>
> (c) Subsection (b) of this section does not apply to an assignment to a financing institution of money due or to become due under a contract providing for payments totaling at least $1,000 when --
>
> (1) the contract does not forbid an assignment;
>
> (2) unless the contract expressly provides otherwise, the assignment --
>
> (A) is for the entire amount not already paid;
>
> (B) is made to only one party, except that it may be made to a party as agent or trustee for more than one party participating in the financing; and
>
> (C) may not be reassigned; and
>
> (3) the assignee files a written notice of the assignment and a copy of the assignment with the contracting official or the head of the agency, the surety on a bond on the contract, and any disbursing official for the contract.

We first address appellant's waiver argument. Notwithstanding the strict provisions of the Assignment of Claims Act, it has long been held that the Government may recognize an assignment. *Maffia v. United States*, 163 F. Supp. 859 (Ct. Cl. 1958). The precise actions which constitute recognition are unclear, but where "the Government's course of conduct, its statements to the parties and its dealings with the assignee indicate it acknowledges the assignee as the contractor, recognition has been found." *Tuftco Corp. v. United States*, 614 F.2d 740, 745 (Ct. Cl. 1980). In order to ascertain whether the Government has waived the Assignment of Claims Act here, we must review the circumstances involved.

The Air Force was well aware of and had an interest in Martech's bankruptcy proceedings, as those proceedings were an impediment to the default termination. It obtained relief from the automatic stay. The Air Force entered into the takeover agreement, which, while not completely unambiguous, allowed appellants to "expressly [reserve] any

and all rights, equities and claims which Principal [Martech] or Surety may have against Obligee [Government] arising out of its administration of the Original Contract . . ." and entitled appellants to "any and all other monies . . . payable to Principal if there had been no default . . . ." (Finding 4) The Government's conduct thereafter in negotiating the sureties' claims indicates an interpretation of the takeover agreement as recognizing an assignment of Martech's claims. An interpretation that is manifested before a dispute arises is especially persuasive. *Blinderman Construction Co. v. United States,* 695 F.2d 552 (Fed. Cir. 1982).

Moreover, a copy of the motion seeking approval of the settlement agreement in the bankruptcy litigation was provided to an Assistant U.S. Attorney in Alaska and there is no evidence of a Government objection (finding 5). While there is no proof the Air Force had knowledge of the settlement agreement and the Bankruptcy Court Order, knowledge thereof can be imputed to the Justice Department. In September 1994 the Air Force began negotiating the claim. In August 1996 the Justice Department became the primary agency negotiating the claim and raised the question of appellants' standing sometime in 1997. Appellants responded with a 15 May 1997 letter asserting that the takeover agreement gave them the right to pursue Martech's claims and that the Government had waived the Assignment of Claims Act. Negotiations continued thereafter. That letter is the last communication between the Justice Department and appellants in the record. The 15 May 1997 letter was provided to the contracting officer by letter of 12 November 1997. Internal evaluations continued thereafter. The contracting officer's decision was issued on 17 July 1998 and paid appellants $1,796 for a portion of the Martech claims. The decision made no mention of appellants' standing or the Assignment of Claims Act as a bar to recovery. (Findings 10 through 15) Until February 2001 when the Air Force filed this motion to dismiss, there seemed little question from its conduct that the Government believed the claims were assigned to appellants. We believe the totality of the circumstances militates toward waiver of the Assignment of Claims Act. We hold that the Government waived that Act with respect to Martech's claims and, to reiterate, we interpret the takeover agreement as granting appellants the right to pursue Martech's claims. *Cf. Insurance Company of the West*, ASBCA No. 35253, 88-3 BCA ¶ 21,056 at 106,347 (takeover agreement explicitly assigned original contractor's rights).

Because of our finding of waiver by the Government, we do not address the parties' arguments on assignment by operation of law. However, while it may be argued that the settlement agreement and the Bankruptcy Court Order do not expressly assign the Martech claims to appellants, we think there is no question that the trustee waived any claims it might have under any contract where there was a takeover agreement (finding 7). Thus, there is no impediment to appellants presented by either the possibility of multiple suits against the Government on the Martech claims or by any failure to consider the rights of the original contractor or the bankruptcy estate with respect to those claims. *Cf. United Pacific I* at 154,509.

Our decision here does not lose sight of our holdings in *United Pacific I* and *Fireman's Fund*. We think appellants have established through the totality of the circumstances the existence of "some other agreement between the Government, the contractor and the surety amounting to an assignment . . . ." *United Pacific I* at 154,507. On that basis this case is distinguishable.

Finally, the Government argues appellants' claims are barred under the doctrines of laches and estoppel, because appellants seek to prosecute causes of action that, in some instances, are 10 or more years out of date. The doctrine of laches is potentially available to the Air Force as an affirmative defense, but has no bearing on our jurisdiction. *Ra-Nav Laboratories, Inc.*, ASBCA No. 49211, 96-2 BCA ¶ 28,514 at 142,397 ("While the Board may consider laches in deciding the merits of the appeal, laches does not impair the Board's jurisdiction."). Similarly, estoppel is a substantive rule of law which we have jurisdiction to consider. *Bell County Water Control and Improvement District,* ASBCA No. 22843, 78-2 BCA ¶ 13,446. Accordingly, we need not examine laches or estoppel for purposes of the instant motion.

Equitable Subrogation

The Government argues that the recent decision of the United States Court of Appeals for the Federal Circuit in *Insurance Company of the West v. United States, supra*, divests us of jurisdiction as to portions of the claim involving equitable subrogation. In *United Pacific Ins. Co.*, ASBCA No. 53051, 20 July 2001, we rejected a similar argument by the Government. We concluded that *Insurance Company of the West* left our equitable subrogation jurisdiction unchanged. We reach the same conclusion here.

For the reasons discussed above, the Government's motion to dismiss is denied.

Appellant's Motion for Sanctions

Appellants also seek to recoup their expenses, including attorneys' fees, incurred in opposing the Government's motion to dismiss as a sanction. According to appellants, the Government's motion was "specious, replete with belated and disingenuous arguments merely asserted in an attempt to circumvent liability." (App. supp. opp. at 1) Appellants further contend that the Government unreasonably refused to retract its motion, despite the urgings of appellants' counsel. We treat appellants' request as a motion for sanctions pursuant to Board Rule 35.

Unlike a federal court, this Board has no authority to assess monetary penalties against a litigant. *E-Systems, Inc.*, ASBCA No. 46111, 97-1 BCA ¶ 28,975 at 144,301; *Stemaco Products, Inc.*, ASBCA No. 45469, 94-3 BCA ¶ 27,060 at 134,843. Accordingly, appellants' demand for attorneys' fees and other expenses is not an available remedy in this forum, even if sanctions otherwise were appropriate.

Moreover, appellants have not established that sanctions are warranted on the facts of this case. Under Board Rule 35, we normally impose sanctions only when a party fails, or refuses, to comply with an order of the Board. *E.g.*, *Astor Bolden Enterprises, Inc.*, ASBCA No. 52377, 00-2 BCA ¶ 31,115 at 153,675. In determining whether sanctions are justified, we weigh a variety of considerations, including "the presence or absence of willfulness, the degree of prejudice to the parties, the delay, burden and expense incurred by the movant, and evidence of compliance with other Board orders." *Lockheed Martin Corp.*, ASBCA No. 45719, 99-1 BCA ¶ 30,312 at 149,884. In this case, no showing has been made that the Air Force disobeyed any order of the Board, or that appellants suffered any resulting prejudice. Furthermore, although the Government did not prevail on its motion to dismiss, we do not perceive the motion to have been so far-fetched and unreasonable as to amount to a willful effort to obstruct proceedings. Accordingly, no grounds exist to impose sanctions against the Government.

CONCLUSION

The Government's motion to dismiss is denied. We conclude that appellants have standing to pursue this appeal. Appellants' request for sanctions is also denied.

Dated: 24 August 2001

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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 No. 51813, Appeal of Security Insurance Co. of Hartford and National American Insurance Co., rendered in conformance with the Board's Charter.

Dated:

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