ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
United Pacific Insurance Co.	)	ASBCA No. 53051
	)	
Under Contract No. F28609-95-C-0036	)	

APPEARANCES FOR THE APPELLANT: Gary A. Wilson, Esq.
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OPINION BY ADMINISTRATIVE JUDGE DICUS ON APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONDENT'S MOTION TO DISMISS PRE-TAKEOVER AGREEMENT CLAIMS FOR LACK OF STANDING

This appeal arises from a claim by a surety that completed performance under a takeover agreement. The Government moves to dismiss for lack of standing the portion of appellant's claim that arose before the takeover agreement was executed. Appellant insists that it has standing to prosecute the claim, and moves instead for summary judgment on selected aspects. For the reasons discussed *infra*, we grant the Government's motion in part and deny appellant's motion.

FINDINGS OF FACT
FOR PURPOSES OF THE MOTIONS

1. On 21 September 1995, the Department of the Air Force (Air Force or Government) awarded contract F28609-95-C-0036 (contract) to Castle Abatement Corp. (Castle) at a price of $3,152,174. The contract called for the renovation and repair of three World War II-era buildings at McGuire AFB, New Jersey. As required by the contract and the Miller Act, 40 U.S.C. §§ 270a *et seq.*, Castle furnished to the Government performance and payment bonds valued at $3,152,174 and $1,576,087, respectively. United Pacific Insurance Co. (United or appellant) was surety on the bonds tendered by Castle. United was not a party to the contract between Castle and the Air Force. (R4, tab 1; App. Supp. R4, tab 1)

2. Castle and United entered into a "Continuing Agreement of Indemnity" (the indemnity agreement) whereby Castle agreed to compensate United for losses or expenses incurred in connection with the bonds issued by United (app. resp., ex. B). As part of the indemnity arrangement, Castle pledged to United as collateral "[a]ll rights, actions, causes of action, claims and demands of the undersigned in, or arising from or out of, [contract F28609-95-C-0036] or any extensions, modifications, changes or alterations thereof or additions thereto" (*id*. at ¶ 4). The Government was not a party to the indemnity agreement, and there is no indication in the record that the Government ever approved, or consented to, that agreement.

3. After performance was underway, Castle requested in a 27 May 1997 letter that the Air Force forward to United, "Attn. Mr. Frederick Zauderer," any future payments due to Castle under the contract. Castle advised the Air Force that "[t]his direction is irrevocable in accordance with an agreement between Castle Abatement Corp. and The United Pacific Insurance Company. Please, therefore, do not permit any change or deviation from this request without your receiving written consent to any suggested change from The United Pacific Insurance Company." (App. Supp. R4, tab 33) The contracting officer, Kathleen DeMito, thereafter telephoned Mr. Zauderer. As she did not believe the 27 May 1997 letter had any legal effect, she told him a contract modification would be necessary. Mr. Zauderer reportedly told Ms. DeMito that he did not want to modify the contract as he hoped United would not have to assume total responsibility for the contract. (R4, tab 98)

4. By letter of 17 June 1997, Castle requested financial assistance from United in order to complete the project. Castle warned United that:

> [F]inancial assistance is absolutely necessary if Castle Abatement Corporation is to continue its performance of the contract, and to cure its current default of its bond and contract obligations. Should you refuse to furnish the requested assistance, we regret to advise you that we will be unable to cure our default and continue with work. Thus, we will have to abandon performance of the aforesaid contract.

(Rule 4, tab 49) The contracting officer was not aware of the letter until 8 July 1997 (R4, tab 98).

5. In a 26 June 1997 response to Castle's 27 May 1997 request, an Air Force official informed United that progress payment no.12, in the amount of $116,962.05, would be transmitted shortly, and that he had "requested payment be mailed to your office" (App. Supp. R4, tab 34). Castle had submitted Request for Payment No. 12 on 25 June 1997 and it was approved by the contracting officer on that same date. The Government released progress payment no.12 to Castle, not United. (Rule 4, tabs 87, 98) According to United, Castle did not relay the proceeds to United (App. R4 Supp, tab 41). Appellant

maintains that it "has not received any information that [Castle] used the monies paid by the Government to satisfy obligations related to the Original Contract" (app. mot. at 4). The record is otherwise silent on how Castle used the funds.

6. United rejected Castle's plea for assistance and notified the Air Force of its decision (R4, tab 50). On 15 July 1997, the Government ordered Castle to show cause why the contract should not be terminated for default (R4, tab 52). Castle responded that, "due to the discontinuance of financial support from our bonding company," Castle was suspending operations and laying off its employees (R4, tab 53). On 21 July 1997, the Government terminated the contract for default (R4, tab 55). There is no evidence that Castle appealed or otherwise contested the default termination.

7. On 5 August 1997, the Air Force and United entered into a takeover agreement whereby United agreed to complete the remaining work under the contract. Castle was not a party to the takeover agreement. By unilateral contract Modification P00008, the Government formally incorporated the takeover agreement into the contract. (R4, tab 56)

8. The takeover agreement provided in part that:

> SURETY [*i.e.*, United] expressly reserves all prior rights including but not limited to the Government's overpayment to the Contractor, equitable liens and rights to subrogation that would be the United States', the laborers' or materialmens's or the contractor's under the CONTRACT or at law or equity, as well as its own rights dating back to the execution of the performance and payment bonds, including, but not limited to those rights and remedies that may accrue during the completion of the CONTRACT. No waiver of such rights is agreed to or implied or intended regardless of any provisions of this TAKEOVER AGREEMENT to the contrary. Any disagreement between the GOVERNMENT and SURETY shall be considered a dispute within the Disputes Clause contained within the CONTRACT and SURETY shall be entitled to exercise such rights as are afforded by the Disputes Clause and the Contract Disputes Act of 1978, as amended.

(R4, tab 56 at ¶ 10)

9. The takeover agreement did not address United's right to prosecute preexisting claims belonging to Castle, and did not mention the indemnity arrangement between Castle and United. The takeover agreement made no reference to the assignment of any identifiable claim that Castle might have had against the Air Force. No three-party

agreement between Castle, United, and the Air Force was ever reached with regard to any claim that might be asserted against the Air Force. (R4, tab 56)

10. United engaged the firm of Lattimer & Associates to complete the remaining contract work (App. R4 Supp. tab 42). Although the contracting officer concedes in her affidavit that the job was substantially completed by Lattimer, she maintains that uncorrected performance deficiencies still exist. She also disputes the amount of the contract balance. According to her, United's claim therefor of $175,745.62 includes an amount "for estimated quantities which United Pacific did not do after the takeover agreement." (R4, tab 98; complaint and answer, ¶ 9)

11. In April 2000, appellant submitted a certified claim to the contracting officer (R4, tabs 64 and 65). The claim sought relief, *inter alia,* for alleged delays and changes that occurred during Castle's performance of the contract (*id*.). Upon receipt of the claim, the contracting officer informed United that a final decision would be forthcoming "on or about" 12 September 2000 (R4, tab 68). United insisted that a decision be issued "on or before" 12 September 2000 (*id.*, emphasis in original). On 18 September 2000, United appealed to this Board on grounds of a deemed denial (R4, tab 67). On that same day, United received the contracting officer's decision denying its claim (R4, tabs 66 and 68). There is no evidence that Castle authorized, or in any way participated in, the filing of the claim or the prosecution of this appeal.

DECISION

United now moves for summary judgment on selected aspects of its claim. The Government opposes appellant's motion, and moves to dismiss for lack of standing that portion of United's allegations which arose before execution of the takeover agreement. We address the Government's motion first because the issue presented is jurisdictional. We then consider United's motion for summary judgment.

Government's Motion to Dismiss

Pursuant to the Contract Disputes Act of 1978 (CDA), as amended, 41 U.S.C. §§ 601 *et seq*., the Board's jurisdiction extends only to appeals brought by a "contractor." A "contractor" is defined as "a party to a Government contract other than the Government." 41 U.S.C. § 601(4). In the instant case, United entered into a takeover agreement with the Government on 5 August 1997. (Finding 7) Thus, United plainly is a "contractor" with respect to claims arising during performance of the takeover agreement. The issue to be resolved here is whether United also has standing to prosecute claims that emerged *before* execution of the takeover agreement. At that time, United was a surety on behalf of Castle, the prime contractor. (Finding 1) Appellant has the burden of establishing that it has standing, *Hackney Group and Credit General Ins. Co.,* ASBCA No. 51453, 00-2 BCA ¶ 30,931 at 152,682, citing *Maniere v. United States,* 31 Fed. Cl. 410 (1994), and that we

have jurisdiction, *Reynolds v. Army and Air Force Exchange Service,* 846 F.2d 746, 748 (Fed. Cir. 1988); *Security Ins. Co. of Hartford,* ASBCA No. 51759, 00-2 BCA ¶ 31,021 at 153,210.

Prior decisions of this Board have held that a surety, because it lacks privity of contract with the Government, has no standing to prosecute pre-takeover CDA claims for affirmative relief, unless there has been a valid assignment of those claims from the defaulted contractor to the surety. *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 ("without 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."); *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 ("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."); *Engineering Tech. Consultants, S.A.*, ASBCA Nos. 44237 *et al*., 94-1 BCA ¶ 26,334. In the instant case, no formal agreement was ever reached between Castle, United, and the Air Force whereby all three parties approved the transfer of pre-takeover causes of action from Castle to United. (Finding 9) Thus, appellant will have standing to pursue pre-takeover agreement claims only if it can establish that the Government somehow agreed or acquiesced to the assignment of those claims.

United contends that, under the terms of the indemnity agreement, United acquired from Castle the right to pursue causes of action belonging to Castle under the contract. (Finding 2) Although the Government was not a party to the indemnity agreement, United maintains that the Government, by later executing the takeover agreement, recognized and accepted United's right to pursue claims that once belonged to Castle. Appellant maintains that the two agreements, when read in combination, amount to a *de facto* assignment from Castle to United of the right to pursue pre-takeover agreement claims.

We find this argument without merit. As we have noted, the Government was not a party to the indemnity agreement, and did not participate in the preparation of that agreement. (Finding 2) Since the indemnity agreement was merely a bargain between two private entities without any Government involvement, it provides no basis for our jurisdiction. *Admiralty Constr., Inc. v. Dalton,* 156 F.3d 1217, 1222 (Fed. Cir. 1998) ("The CDA gives neither this court nor the Board power to enforce or construe [the contractor's indemnity agreement with the surety]."); *United Pacific Ins. Co.,* 01-1 BCA at 154,506 ("Board jurisdiction on behalf of a surety is not obtained through the provisions of an indemnity agreement between the surety and a contractor."). Nor are we persuaded that the Government might have consented to the terms of the indemnity agreement by later

executing the takeover agreement. The takeover agreement made no reference to the indemnity agreement, or to the assignment of any claims from Castle to United. (Finding 9) Indeed, there is no reason to believe that the Government even was aware of the indemnity agreement's existence until after the takeover agreement was executed. It is true that the takeover agreement did contain language reserving United's right to pursue litigation against the Air Force. (Finding 8) However, we construe the language in question as addressing causes of action that would be available to a surety by way of equitable subrogation. (*Id*.) Accordingly, we see no indication, either in the takeover agreement or elsewhere in the record, that the parties intended and bargained for United to pursue claims belonging to Castle that arose before execution of the takeover agreement. We conclude that the Government did not consent to the purported transfer of claims. Because no valid assignment occurred, appellant lacks standing to pursue pre-takeover agreement claims belonging to Castle. *Cf. Ins. Co. of the West*, ASBCA No. 35253, 88-3 BCA ¶ 21,056 (surety was entitled to prosecute an appeal in its own name when the Government, the surety, and the defaulting contractor entered into a three-party takeover agreement that specifically assigned to the surety the right to pursue the defaulted contractor's claims).

The parties also debate the extent to which United might pursue pre-takeover agreement allegations under a theory of equitable subrogation. Generally, "to maintain a claim for equitable subrogation, a surety must either take over contract performance or finance the completion of the defaulted contract under its performance bond." *Admiralty Constr., Inc. v. Dalton*, 156 F.3d at 1222. Under equitable subrogation, a surety has standing to claim funds held by the Government or funds improperly disbursed to a third party. *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. However, equitable subrogation does not provide a basis for a surety to prosecute claims belonging to the original contractor that arose before execution of a takeover agreement. *United Pacific Ins. Co.*, 01-1 BCA at 154,508; *Fireman's Fund Ins. Co.*, 00-1 BCA at 152,071; *Westech Corp. v. United States*, 20 Cl. Ct. 745, 749-50 (1990) (refusing to allow surety to recover via equitable subrogation for alleged delays and acceleration suffered by prime contractor, because "a surety's recovery of such damages suffered by a contractor is simply beyond the scope of equitable subrogation.").

The Air Force maintains that a recent Supreme Court decision, *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999), may have restricted, or even abolished, the doctrine of equitable subrogation. (Gov. mot. at 11-14) In *Blue Fox*, the Supreme Court considered a suit by a subcontractor against the Government under the Administrative Procedure Act, 5 U.S.C. § 702. The subcontractor sought an "equitable lien" on contract proceeds not paid to the prime contractor. In a unanimous decision, the Supreme Court determined that the subcontractor's suit was barred under the doctrine of sovereign immunity. Furthermore, addressing a line of equitable subrogation cases, the Supreme Court declared that these decisions "do not in any way disturb the established rule that, unless waived by Congress, sovereign immunity bars subcontractors and other creditors

from enforcing liens on Government property or funds to recoup their losses." *Blue Fox,* 525 U.S. at 265. Relying on *Blue Fox*, the Air Force suggests that "the Supreme Court's statements call into question all of the equitable subrogation cases that have not included an analysis of sovereign immunity in the decision." (Gov. mot. at 13)

In response, United invokes an even more recent decision in which the Court of Appeals for the Federal Circuit considered the impact of *Blue Fox* on the doctrine of equitable subrogation. *Ins. Co. of the West,* 243 F.3d 1367 (Fed. Cir. 2001). In its decision, the Court of Appeals found that the United States has waived sovereign immunity for equitable subrogation claims by a surety against the Government. *Ins. Co. of the West,* 243 F.3d at 1372-75. According to the Federal Circuit, *Blue Fox* -- which did not involve an equitable subrogation issue at all -- "did not upset the longstanding rule that [an equitable subrogation] suit is not barred by the doctrine of sovereign immunity." *Ins. Co. of the West,* 243 F.3d at 1369.

The Federal Circuit's interpretation of *Blue Fox* is controlling precedent for this Board. *E.g., Mendenhall v. Cedarapids, Inc.*, 5 F.3d 1557, 1570 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). Accordingly, following *Ins. Co. of the West,* we find that, to the extent that United could have pursued a claim for equitable subrogation before *Blue Fox*, it may also do so now. Thus, appellant would have standing under equitable subrogation to assert a claim for funds retained by the Government or improperly disbursed to Castle. On the other hand, neither the Supreme Court nor the Federal Circuit appear to have *expanded* the doctrine of equitable subrogation so as to permit a surety, without privity of contract, to pursue claims belonging to the original contractor that arose before execution of a takeover agreement. Therefore, in accordance with our above analysis, United has no standing to prosecute claims arising from Castle's performance prior to the 5 August 1997 takeover agreement.

The Government's motion to dismiss is granted except as to its argument that the doctrine of equitable subrogation has been altered by *Blue Fox*. We retain jurisdiction of the post-takeover portions of the appellant's allegations, as well as its equitable subrogation claims for the contract balance and improper disbursement of funds.

Appellant's Motion for Summary Judgment

United has moved for summary judgment. We evaluate the motion under the established standard that:

> Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. . . . The moving party bears the burden of establishing the absence of any genuine issue of

> material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment.

Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987); FED. R. CIV. P. 56. Moreover, as the movant with the burden of proof at trial, appellant's position requires a positive showing. *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986), citing W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Issues of Material Fact*, 99 FRD 465, 487-88 (1984).[*] Finally, in deciding a motion for summary judgment, our task is not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851.

United seeks summary judgment on two principal issues. First, United maintains that it fully performed its contractual obligations under the takeover agreement, and therefore is entitled to recover the unpaid contract balance. Second, appellant insists that the Government improperly released progress payment no.12 to Castle, even though the Government previously had been advised that such payments should be made only to United. According to appellant, the misdirected payment harmed United by forcing it to expend additional funds from its own resources to complete the contract.

Regarding the issue of the unpaid contract balance, a surety that finances a contract to completion is subrogated to the contractor's property rights in that unpaid balance. *Balboa Ins. Co.*, 775 F.2d at 1161. The Government here disputes whether United and Lattimer have actually completed the contract work in a satisfactory fashion. (Finding 10) According to the Government, the work did not fully conform to contract requirements, and the claimed amount includes estimated quantities which appellant did not provide. (Resp. reply at 9) The Government supports its position with the contracting officer's affidavit (finding 10). We are thus confronted with a material dispute of fact concerning whether United completed the contract, thereby placing its entitlement to the unpaid contract balance at issue. As the party opposing summary judgment, the Government is entitled to the benefit of all inferences that can reasonably be drawn from the facts. *Mingus Constructors, supra*. Appellant, on the other hand, is the party with the burden of proof at trial and it must make a stronger showing than it has here. *Calderone, supra*. We conclude that appellant has not established that it is entitled to judgment as a matter of law on this issue.

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[*] When the movant does not have the burden of proof at trial, it may be sufficient to show that the nonmoving party cannot meet its burden. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); Schwarzer, *supra* at 487. Here, United has the burden at trial and it cannot place the ball in respondent's court without affidavits or other evidence sufficient to establish its case.

Appellant also contends that it is entitled to summary judgment concerning the Government's disbursement of progress payment no.12. According to appellant, progress payment no.12 was improperly forwarded to Castle even after the Government was notified that future progress payments should be made to United. (Findings 3-5) While acknowledging that it received the notification, the Government insists that its payment to Castle was appropriate.

It is settled law that, once a surety notifies the Government that the surety's interest is in jeopardy because of default by the contractor, the Government becomes a "stakeholder" for the remaining contract proceeds. *E.g.*, *Ransom v. United States*, 900 F.2d 242, 245 (Fed. Cir. 1990). If the Government unreasonably fails to protect the surety's interest, such as by improperly releasing payments to the defaulted contractor, the Government may be liable to the surety for its actions. On the other hand, the Government also has an interest in the timely and efficient completion of contract work, and therefore is entitled to exercise discretion in overseeing performance and making payments. *Balboa Ins. Co. v. United States*, 775 F.2d 1158 (Fed. Cir. 1985). Thus, the Government's obligations as "stakeholder" do not necessarily take precedence over other considerations of contract administration. Rather, the Government is charged with a "duty to exercise its discretion responsibly and to consider the surety's interest in conjunction with other problems encountered in the administration of the contract." *Balboa*, 775 F.2d at 1164 (quoting *Argonaut Ins. Co. v. United States*, 434 F.2d 1362, 1368 (Ct. Cl. 1970)). The Federal Circuit has identified eight criteria to be considered in determining whether the Government exercised reasonable discretion in distributing funds. *Balboa*, 775 F.2d at 1164-65.

In the instant case, there is a dispute of fact as to whether the Air Force had sufficient notice that United's interest was imperiled, such as to give rise to a "stakeholder" relationship. Ms. DeMito telephoned United's representative, Mr. Zauderer, and explained that the contract needed to be modified for payments to be forwarded. According to her, he declined to take the necessary steps and told her he hoped United would not have to assume total responsibility for the contract (finding 3). Ms. DeMitio was not aware of Castle's 17 June 1997 letter until after payment no. 12. This falls short of the factual predicate necessary for judgment.

Moreover, assuming that the Government was a "stakeholder," it does not follow that any payment made to Castle would necessarily be improper. Instead, our decision would turn on whether the Government acted reasonably in making the payment to Castle rather than United. We have generally refused to grant summary judgment where the reasonableness of conduct was at issue. *United Technologies Corporation/Pratt & Whitney*, ASBCA No. 43645, 94-3 BCA ¶ 27,241*; see also U.S. Fidelity & Guaranty Co. v. United States*, 16 Cl. Ct. 541, 546 (1989) (refusing to decide on summary judgment whether the Government abused its discretion by forwarding progress payments to the contractor after notice of default because "[t]he resolution of this issue depends on the

factors enumerated in *Balboa*, for which there is an insufficient record upon which this court can render judgment."). Finally, even if it were clear that the Government's payment to Castle was improper, it would still be "relevant to consider what the contractor did with the released funds. If the unauthorized payments were expended for the purposes of the contract so that the extent of the surety's subsequent performance was reduced thereby, any injury to the surety would to that extent be mitigated." *National Surety Corp. v. United States*, 118 F.3d 1542, 1548 (Fed. Cir. 1997). Here, we are offered little information as to how Castle chose to expend the proceeds in question. (Finding 5) As the proponent of the claim, the burden is on United and it may not be granted summary judgment with no more than its statement that it has no information that Castle used the funds in contract performance (finding 5). *Calderone, supra*. Accordingly, a more detailed record is necessary before we could determine whether the Government's handling of progress payment no.12 was an abuse of discretion, and whether United suffered any resulting injury. The existing record is insufficient to conclude that appellant is entitled to judgment as a matter of law on these issues.

Conclusion

The Government's motion to dismiss is granted except as to equitable subrogation. Appellant's motion for summary judgment is denied.

Dated: 20 July 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. 53051, Appeal of United Pacific Insurance Co., rendered in conformance with the Board's Charter.

Dated:

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