ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Kellogg Brown & Root Services, Inc.	)	ASBCA No. 56256
	)	
Under Contract No. W9126G-04-D-0001	)	

APPEARANCES FOR THE APPELLANT: Karen L. Manos, Esq.
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Washington, DC

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
Robert T. Wu, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE THOMAS ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE TO DISMISS FOR LACK OF JURISDICTION AND APPELLANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Appellant Kellogg Brown & Root Services, Inc. (KBR) seeks payment and/or prompt payment interest penalties on invoices submitted under the captioned contract for supplies and services in Iraq. The total amount of the claim is $3,815,595.30. The government moves for summary judgment or in the alternative to dismiss the appeal for lack of jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613.[1] Appellant opposes the motion and cross-moves for summary judgment on the merits.

The U.S. Army Corps of Engineers (USACE) awarded the contract on 16 January 2004. Effective 20 April 2004, the government unilaterally transferred the contract to the Coalition Provisional Authority (CPA). On 28 June 2004, the CPA dissolved and transferred its authority to the Interim Iraqi Government (IIG). The invoices in question relate to nine task orders (TOs) under the contract which were funded in whole or part with Development Fund for Iraq (DFI) funds, which are not appropriated funds. The

[1] Although the government styles its motion as one for summary judgment or in the alternative to dismiss for lack of jurisdiction, it makes no separate argument with respect to summary judgment and we view the motion as one to dismiss the appeal for lack of jurisdiction.

government maintains that subsequent to 20 April 2004 there was no contract with an executive agency of the United States government subject to the CDA, and furthermore, appropriated funds cannot be used to pay any judgment. Appellant argues *inter alia* that the contract was entered into by the government and that it never agreed to a transfer. We deny the motion to dismiss the appeal for lack of jurisdiction, subject to further development of the facts. Because the jurisdictional issues require further development, we do not reach appellant's cross-motion for summary judgment on the merits.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION TO DISMISS

Formation of the CPA and Subsequent Dissolution and Transfer of Authority to the IIG

1. On or about 8 May 2003, the Coalition partners in Iraq, including the United States and the United Kingdom, created the CPA to exercise powers of government temporarily in Iraq (government proposed findings of fact (GPFF) ¶ 1[2]).

2. CPA Regulation No. 3, "Program Review Board" (PRB), established the PRB. The PRB had responsibility for managing the funds available to the CPA. Those funds included funds appropriated by the United States Congress and its counterparts in the coalition countries and DFI funds. DFI funds were to be used for the benefit of the people of Iraq and held by the Central Bank of Iraq. (GPFF ¶¶ 3, 5, 18) The PRB funding citations below refer to DFI funds.

3. CPA Memorandum No. 15 (Memo No. 15) dated 15 June 2004 stated that the CPA would "dissolve" on 30 June 2004 and that full governance authority of Iraq would transfer to the IIG on that date. The memorandum stated that the IIG would assume control of the DFI. Although Memo No. 15 and some of the documents quoted below refer to 30 June 2004 as the date of transfer, the actual transfer of authority occurred on 28 June 2004. (GPFF ¶ 7)

4. Also on 15 June 2004, the Minister of Finance for the IIG delegated authority to administer contracts funded with monies from the DFI (with certain limitations not relevant here) to the CPA Program Management Office (CPA-PMO or PMO). Effective 30 June 2004, the Minister of Finance transferred this authority to the Chief of Mission of the United States Embassy Baghdad and to the Commander of the Multi-National

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[2] Appellant states that it does not dispute the GPFF for purposes of the motions (Appellant's Statement of Undisputed Material Facts (SUMF) at 1 n.1).

Force-Iraq. IIG representatives subsequently extended the delegation until 31 December 2006. (GPFF ¶¶ 22, 47, 50)

5. Following dissolution of the CPA, an office known as the Project and Contracting Office (PCO), initially administered the former CPA contracts under the delegation from the Minister of Finance. The PCO was an office of the Department of Defense established by presidential directive as the successor organization to the CPA-PMO. Subsequently, the Joint Contracting Command-Iraq/Afghanistan (JCC-I/A) assumed responsibility for administering the contracts under the delegation from the Minister of Finance. The JCC-I/A was established by the Department of the Army as a joint in-theatre contracting entity. (R4, tab 21 at 3; GPFF ¶ 47; app. opp'n at 5-6)

The Contract

6. On 16 January 2004, contracting officer John H. Rodgers (CO Rodgers), USACE, Fort Worth District, Southwestern Division (SWD), awarded KBR indefinite delivery, indefinite quantity (IDIQ), cost plus award fee Contract No. 9126G-04-D-0001 (the contract), for repair and continuity operations of Iraq oil infrastructure. The contract was in a not-to-exceed amount of $1,200,000,000 for the life of the contract with a guaranteed minimum of $500,000. The contract obligated appropriated funds in the amount of $500,000. The performance period consisted of a base period of two years and three one-year options. (R4, tab 1 at 3-5, 7)

7. The contract included FAR 52.216-22, INDEFINITE QUANTITY (OCT 1995); FAR 52.232-1, PAYMENTS (APR 1984); FAR 52.232-25, PROMPT PAYMENT (FEB 2002); and FAR 52.233-1, DISPUTES (JUL 2002) ALTERNATE I (DEC 1991), which stated that the contract was subject to the CDA. Section G indicated that payment vouchers should be submitted to USACE at the SWD and at the Finance Center in Millington, TN. (R4, tab 1 at 38, 77, 105, 107, 112)

8. The contract provided for task orders (TOs). FAR 52.216-18, ORDERING (OCT 1995) stated:

> (a) Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the Schedule. Such orders may be issued from the date of contract award through five years thereafter.
>
> (b) All delivery orders or task orders are subject to the terms and conditions of this contract. In the event of conflict

> between a delivery order or task order and this contract, the contract shall control.

(R4, tab 1 at 76) The Schedule did not specifically designate any individuals or activities who might issue TOs other than "the Contracting Officer" (R4, tab 1, § H at 50).

9. Unilateral contract Modification No. P00003 stated that "[s]ubject contract and funding are hereby transferred from U.S. Army Corps of Engineers, Southwestern Division (SWD) to CPA-PMO Contracting Activity" in Baghdad effective 20 April 2004. Procuring contracting officer duties were "hereby transferred" from CO Rodgers to Edward Chevalier (CO Chevalier), CPA-PMO. (R4, tab 19)

10. A total of 30 TOs were issued under the contract. TO Nos. 1-9 were issued prior to the transfer to the CPA and were funded initially with appropriated funds. TO Nos. 10-25 were issued by CO Chevalier at the PMO; seven of those TOs were funded with PRB cites referring to the DFI and nine of the TOs were funded with appropriated funds. TO Nos. 26-30 were issued by COs at the PCO or JCC-I/A. All of TO Nos. 26-30 were funded with appropriated funds. (App. opp'n at 5 and exs. 2-31)

11. In this appeal, KBR claims payments and prompt payment interest penalties due on invoices under two of the TOs issued prior to the transfer to the CPA (Nos. 4 and 6). It also claims payments and/or prompt payment interest penalties due on invoices on the seven TOs issued after the transfer which were funded with monies from the DFI (Nos. 10, 18, 19, 22-25). Facts relating to those TOs follow.

Task Order No. 4

12. On 4 March 2004, CO Rodgers of the USACE issued TO No. 4 in the not-to-exceed amount of $100,000,000 for fuel import and delivery mission to Iraq. The TO obligated U.S. Army Operations and Maintenance (O&M) funds, which are appropriated funds. Modification Nos. 01 and 02, dated 19 and 29 March 2004, increased the funding, using O&M funds, to $170,000,000. (R4, tabs 13, 16, 17; GPFF ¶¶ 13, 14)

13. By date of 31 March 2004, KBR submitted its first invoice on TO No. 4 in the amount of $2,435,129 (elsewhere stated to be $2,435,127). This invoice was paid on 20 April 2004 (R4, tab 302 at 5).

14. Subsequent to the 20 April 2004 transfer of the contract to CPA, $167,564,873 ($170,000,000 less $2,435,127) in O&M funds were deobligated, and a corresponding amount of PRB-622 funds obligated. On 2 June 2004, a USACE representative certified to CPA that the PMO was authorized to submit progress payments for TO No. 4 in the amount of $167,564,873 to be paid from PRB-622 funds. (R4, tab 25 at 1, 9; GPFF ¶ 20)

15. On 23 June 2004, with the dissolution of the CPA imminent, CO Chevalier of CPA-PMO issued unilateral Modification No. 03 to TO No. 4. This modification stated that payment would be by use of an irrevocable letter of credit. The modification notified KBR:

> [E]ffective July 1, 2004, an Iraqi Provisional Government will have contractual authority of this Task Order. These modifications are required because this Task Order is funded by the Development Fund of Iraq (DFI) and as of 1 July 2004, payments from such funding will made [sic] by a payment office different than that indicated in Section G of the Contract, and subject to approval by the Iraqi Provisional Government, Ministry of Finance and Ministry of Oil.

The modification also added the following provision to the task order:

> Contract Authority: The Contractor hereby recognizes that a transfer of authority (TOA) from the Coalition Provisional Authority (CPA) to the interim Iraqi Governing Council is scheduled to take place June 30, 2004. Furthermore, the Contractor recognizes that upon the TOA on June 30, 2004, or upon any later TOA date if delayed, the CPA is dissolved. The CPA, U.S. Government or Coalition Government will not be liable to the Contractor for any performance undertaken after the TOA.… If the interim Iraqi Governing Council undertakes any obligations under this Contract, the CPA recognizes the interim Iraqi Government as its successor in interest with respect to any such obligations.…

(R4, tab 53 at 1, 3) An irrevocable letter of credit for this and the other TOs at issue in this appeal was never issued (SUMF ¶ 113).

16. On 20 July 2004, KBR notified CO Chevalier that it rejected Modification No. 03 and similar unilateral modifications issued under other TOs. KBR stated that it was rejecting the modifications since the government did not have the inherent authority to effectuate them on a unilateral basis, and they did not fall within the power bestowed by the Changes clause. (R4, tab 225 at 66)

17. By dates of 24 April, 17 May, and 12 June 2004, KBR submitted additional invoices. On 30 July and 6 August 2004, KBR was paid the amounts due for those

invoices, totaling in excess of $140,000,000. KBR claims prompt payment interest penalties for late payment of those invoices, starting with the one for 24 April 2004, for which it alleges that the due date was 27 May 2004. By date of 26 July 2004, KBR submitted an invoice which covered the period 30 May through 20 July 2004. It alleges that it has not been paid in full for that and later invoices under TO No. 4. (R4, tab 302 at 5, 11; app. ex. 43)

18. On 14 December 2004, KBR and the PCO entered into modification No. 04 to TO No. 4, definitizing the amount of the TO, and stating that the accounting and appropriation data were changed from that identified in the original TO (O&M funds) to "DFI Funding from PRB-622 memorandum (dated 02 June 2004)." The modification did not contain any release language. (R4, tab 148; GPFF ¶ 44)

Task Order No. 6

19. On 1 April 2004, CO Rodgers issued TO No. 6 in the not-to-exceed amount of $5,000,000 for fuel for generators at Qudas power plant. The TO obligated O&M funds. Subsequent to the 20 April 2004 transfer of the contract, the O&M funds were deobligated, and DFI funds described in this case as "MOE001" obligated. On 2 June 2004, a USACE representative certified to CPA that the PMO was authorized to submit progress payments for TO No. 6 in the amount of up to $5,000,000 from the DFI funds authorized in the Ministry of Electricity's budget. On 21 June 2004, CO Chevalier issued unilateral Modification No. 01 to TO No. 6. This modification was identical in relevant respect to Modification No. 03 to TO No. 4. (R4, tabs 18, 26 at 1, 9, tab 44; GPFF ¶ 20)

20. On 11 December 2004, KBR and the PCO entered into bilateral Modification No. 02 definitizing TO No. 6. The modification stated that the funding was DFI funding as per the letter dated 02 June 2004. The modification did not contain any release language. (R4, tab 146; GPFF ¶ 42)

21. According to its claim, KBR has not been paid in full for invoices on TO No. 6 beginning with an invoice dated 10 October 2006. It claims that the government owes it prompt payment interest penalties back to an invoice dated 17 June 2004, with a due date of 25 July 2004. (R4, tab 302 at 5-6, 11)

Task Order No. 10

22. On 28 April 2004, CO Chevalier issued TO No. 10 in the not-to-exceed amount of $700,000 for benzene import phase 1. The order indicated that the accounting and appropriation data were PRB. On 23 June 2004, CO Chevalier issued unilateral Modification No. 01 to TO No. 10 which was identical, in relevant respect, to Modification No. 03 to TO No. 4. (R4, tabs 20, 51; GPFF ¶ 17)

23. On 16 December 2004, KBR and the PCO entered into bilateral Modification No. 02 to TO No. 10, definitizing that TO, and stating that the available funding was $686,060 from DFI PRB-065. The modification did not contain any release language. (R4, tab 151; GPFF ¶ 46)

Task Order No. 18

24. On 7 June 2004, CO Chevalier issued TO No. 18 in the not-to-exceed amount of $100,000 for Al Faw peninsula oil control. The order indicated that the accounting and appropriation data were "Ministry of Finance 2004 revised budget (5-206050101) Fuels Import Line (ID 3, 150,000,000,000)," DFI funds. On 23 June 2004, CO Chevalier issued Modification No. 01 to this TO which was identical, in relevant respect, to Modification No. 03 to TO No. 4. (R4, tabs 30, 55; GPFF ¶ 21)

Task Order No. 19

25. On 17 June 2004, CO Chevalier issued TO No. 19 in the not-to-exceed amount of $250,000 for pipeline oil spill cleanup. The order indicated that the accounting and appropriation data were "DFI FUNDS PRB #369." On 23 June 2004, CO Chevalier issued Modification No. 01 to this TO which was identical, in relevant respect, to Modification No. 03 to TO No. 4. (R4, tabs 36, 56; GPFF ¶ 25)

Task Order Nos. 22-25

26. On 28 June 2004, CO Chevalier issued TO Nos. 22, 23, 24 and 25. The orders indicated that the accounting and appropriation data were PRB-065. (R4, tabs 63-67)

27. KBR and the PCO definitized TO Nos. 22 and 23 through Modification No. 01 dated 11 December 2004 and Modification No. 02 dated 15 December 2004 respectively. Both modifications stated that the accounting and appropriation data were PRB-065. The modifications did not contain any release language. (R4, tabs 147, 149)

Claim and Appeal

28. On 18 September 2007, KBR submitted to the procuring contracting officer at JCC-I/A, a certified claim under the Disputes clause in the amount of $3,815,595.30. This amount was composed of $2,888,419.78 for nonpayment of invoices and $927,175.52 representing 12 months of prompt payment interest penalties on those and other invoices as of 31 August 2007. KBR stated:

> KBR has long held that the Government's unilateral action regarding novation of the Development Fund Iraq (DFI)-funded task orders was inappropriate. Given the fact that there has been no movement to rectify the situation…in the last year and that KBR has not received payment on outstanding invoices since December 2006, KBR is compelled to seek redress.

(R4, tab 302) Attached spreadsheets showed the claimed amounts due by task order and invoice.

29. On 29 November 2007, KBR appealed from a deemed denial of its claim. The appeal was docketed as ASBCA No. 56256.

DECISION

The USACE awarded an IDIQ contract to appellant in January 2004 and issued nine task orders including two in dispute, TO Nos. 4 and 6, funded with appropriated funds. In April 2004, the USACE unilaterally transferred the contract including TO Nos. 4 and 6 and procuring contracting officer duties to the CPA. The funding for TO Nos. 4 and 6 was changed from appropriated funds to funds from the DFI (Development Fund for Iraq). The CPA-PMO issued sixteen more task orders, including seven in dispute, TO Nos. 10, 18, 19, 22-25, funded with DFI funds, and nine funded with appropriated funds. Appellant seeks payment and prompt payment interest penalties on invoices submitted under the DFI-funded TOs.

The Government's Motion

The government moves to dismiss the appeal for lack of jurisdiction because (1) the CPA is not an "executive agency" within the meaning of the CDA; (2) in accordance with the transfer of authority from the CPA to the IIG on 28 June 2004, the contract and task orders issued by or transferred to the CPA became agreements between KBR and the sovereign government of Iraq; and (3) appropriated funds cannot be used to pay a monetary award in connection with the task orders, which were all funded with Iraqi funds (gov't mot. at 2). The government states that it "is not arguing that the entire contract was transferred from the CPA to the Iraqis, but only those task orders that were originally funded or became funded with DFI funds" (gov't reply at 12).

Appellant argues in opposition that its claim arises under a contract entered into by the USACE, an executive agency, and that the government breached the contract when it purported to assign its payment obligations. It continues:

> A large part of the Government's motion is devoted to establishing that the Coalition Provisional Authority ("CPA") is not an executive agency within the meaning of the Contract Disputes Act. While this may or may not be true, it is wholly irrelevant since the contract at issue in this appeal was not awarded by the CPA. Responsibility for the contract was temporarily assigned to the CPA's Program Management Office, which appears to have been a Department of Defense entity. However, after the CPA ceased to exist, responsibility for the contract was assigned to the Army's Project and Contracting Office, and still later, responsibility for the contract was assigned to the Army's Joint Contracting Command – Iraq/Afghanistan, where it currently resides. The Government's motion is misleading because it focuses solely on the "snapshot" in time when the CPA PMO was managing the contract, and ignores entirely the later assignments of responsibility. By myopically focusing on the CPA – and all but ignoring the contracting officer's purported assignment of the Government's payment obligations – the Government's motion falsely asserts that the contract and task orders went along with the CPA's transfer of sovereignty, and thereby became agreements between KBR and the government of Iraq. The Government's alternative argument is equally unavailing. The Government argues that appropriated funds cannot be used to pay a monetary award because the task orders at issue were funded with Iraqi funds. However, the Contract Disputes Act expressly provides that payments shall be made from the Judgment Fund.

(App. opp'n at 1-2)

Whether the CPA was an Executive Agency

The CDA provides that:

> Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of title 28) entered into by an executive agency for—

> (1) the procurement of property, other than real property in being;
>
> (2) the procurement of services.…

41 U.S.C. § 602(a). It defines "executive agency" as follows:

> (2) the term "executive agency" means an executive department as defined in section 101 of title 5, an independent establishment as defined by section 104 of title 5 (except that it shall not include the Government Accountability Office), a military department as defined by section 102 of title 5, and a wholly owned Government corporation as defined by section 9101(3) of title 31;….

41 U.S.C. § 601.

The CDA is specific that an executive agency must be one of the entities described in Title 5 or Title 31. The CPA, as an entity created by the Coalition partners in Iraq, including the United States and the United Kingdom, does not fit within that description. Appellant does not argue to the contrary. As quoted above, it says that whether the CPA is an executive agency "may or may not be true." In the absence of argument to the contrary from appellant, we conclude that the government is correct that the CPA was not an executive agency within the meaning of the CDA. *Accord MAC International FZE*, ASBCA No. 56355, slip op. 29 October 2010.

The Effect of Transferring the Contract to the CPA and Then to the IIG

We next turn to the question of whether the unilateral transfer of the contract to the CPA and subsequently the IIG meant that KBR no longer had standing under the CDA to assert a claim arising under or relating to the contract against the United States. We construe "transfer" in this context as synonymous with "assign." *See*, *e.g.*, the Anti-Assignment Act, 31 U.S.C. § 3727(a), "assignment" means "a transfer or assignment"; The RESTATEMENT (SECOND) OF CONTRACTS (1981) (Restatement of Contracts) § 317(1), "An assignment of a right is a manifestation of the assignor's intention to transfer it"; *Kennedy v. Plan Administrator DuPont Savings and Investment Plan*, 129 S. Ct. 865, 870 (2009) ("to 'assign' is '[t]o transfer; as to assign property, or some interest therein,' Black's Law Dictionary 152 (4th rev. ed. 1968).")

Questions of this type more commonly arise in the context of a transfer of a contract by the contractor. In those cases, assuming the Anti-Assignment Act, 31 U.S.C.

§ 3727, 41 U.S.C. § 15, does not prohibit the transfer, the transferor generally is no longer a party to a contract with the government subsequent to the transfer and the transferee is the entity which may bring an appeal under the CDA. The transferor may still have standing as to the period prior to the transfer, however, if it has reserved existing rights. Cases of this type include transfers to which the government has consented (typically by novation agreements) and transfers by operation of law. *See, e.g.*, *Sensors, Data, Decisions, Inc.*, ASBCA No. 29386, 85-3 BCA ¶ 18,471 at 92,777 (transferor which had entered into a novation agreement with the government was no longer a contractor for purposes of a claim relating to the period prior to the novation); *Vought Aircraft Co.*, ASBCA No. 47357, 95-1 BCA ¶ 27,421 (transferee by novation had standing with respect to claim which arose before the transfer); *R. W. Electronics Corp.*, ASBCA No. 39486, 91-3 BCA ¶ 24,220 at 121,132 (same); *Pettibone Corp.*, ASBCA No. 41073, 91-2 BCA ¶ 23,952 at 119,930 (transferee by operation of law had standing with respect to claim which arose before the transfer); *Ginsberg v. Austin*, 968 F.2d 1198 (Fed. Cir. 1992) (transferor had standing under the CDA with respect to claim for back rent where novation agreement did not expressly transfer claim); *contrast CBI Services, Inc.*, ASBCA No. 34983, 88-1 BCA ¶ 20,430 (where transfer violated Anti-Asssignment Act, transferee did not have standing as a contractor under the CDA); *NGC Investment and Development, Inc. v. United States*, 33 Fed. Cl. 459 (1995) (same).

We have not located any comparable precedent under the CDA concerning transfers by the government. Furthermore, the parties have not identified any authority comparable to the Anti-Assignment Act, 31 U.S.C. § 3727, 15 U.S.C. § 41, authorizing or prohibiting government transfers. Accordingly we look to the Restatement of Contracts for a statement of the law applicable to transfers. *See Long Island Savings Bank, FSB v. United States*, 503 F.3d 1234, 1245 (Fed. Cir. 2007) ("the Restatement of Contracts reflects many of the contract principles of federal common law"); *Central National Bank of Richmond, VA. v. United States*, 91 F. Supp. 738, 740 (Ct. Cl. 1950) ("When a question regarding assignments as they affect the Government arises, the general law of assignments must govern").

The Restatement of Contracts distinguishes between assignments of rights and delegations of duties. "[R]ights are said to be 'assigned'; duties are said to be 'delegated.'" According to the Restatement:

> "Assignment" is the transfer of a right by the owner (the obligee or assignor) to another person (the assignee). See § 317. A person subject to a duty (the obligor) does not ordinarily have such a power to substitute another in his place without the consent of the obligee; this is what is meant when it is said that duties cannot be assigned. "Delegation" of performance may be effective to empower a substitute to

> perform on behalf of the obligor, but the obligor remains subject to the duty until it has been discharged by performance or otherwise.

(Restatement of Contracts § 316 cmt. c, vol. 3 at 13)

In this case, the paramount duty of the government as obligor was to pay KBR (the obligee) for the supplies or services provided. The Restatement of Contracts provides:

> § 318. Delegation of Performance of Duty
>
> (1) An obligor can properly delegate the performance of his duty to another unless the delegation is contrary to public policy or the terms of his promise.
>
> (2) Unless otherwise agreed, a promise requires performance by a particular person only to the extent that the obligee has a substantial interest in having that person perform or control the acts promised.
>
> (3) Unless the obligee agrees otherwise, neither delegation of performance nor a contract to assume the duty made with the obligor by the person delegated discharges any duty or liability of the delegating obligor.

Applying this provision, delegation of the duty of payment was neither contrary to public policy nor to the terms of the contract. Since money is fungible, KBR had no substantial interest in having the government as opposed to the CPA make payment. The government could, therefore, properly delegate the duty of payment to the CPA. In the absence of agreement by KBR, however, the delegation of performance of the duty of payment to the CPA did not discharge the government from its obligation to make payment in the event the CPA did not do so in accordance with the terms of the contract. The unilateral transfer of the contract to the CPA, and its subsequent transfer to the IIG, did not relieve USACE of its contractual duty of payment to KBR, if payment was not made by the transferees.

This duty of payment extended to all of the TOs in dispute, including those issued by the CPA-PMO, not just to TO Nos. 4 and 6 issued by the USACE. When the USACE transferred procuring contracting officer duties to the CPA-PMO, the USACE effectively designated the CPA-PMO as an activity which was authorized to issue task orders under

the contract (SOF ¶ 9, *see also* SOF ¶ 8). Thus, subsequent to the transfer, the CPA-PMO issued not only the TOs in dispute, but also other TOs funded with appropriated funds. Furthermore, the unilateral TO modifications issued at the end of the CPA's tenure sought to discharge not only the CPA but also the United States government of any further liability, suggesting an ongoing obligation on the part of the United States. (SOF ¶¶ 10, 15)

The government responds that by continuing performance, accepting payments from the DFI, and entering into bilateral modifications definitizing the amounts due under some of the TOs, with fund citations to the DFI, KBR agreed to transfer of the contract and funding to the CPR without recourse against the government (gov't reply at 20). Appellant disagrees:

> [T]hese bilateral modifications (1) were entered into *after* the parties' dispute had arisen about the Government's ability to unilaterally "novate" the task orders, (2) had nothing to do with the transfer of the Contract or change in funding, and (3) did not include a waiver or release of claims.… Moreover, the Government (acting through successive contracting officers) continued to consider the merits of KBR's claim long after these modifications were signed.

(App. opp'n at 9-10)

The Restatement of Contracts explains that a duty may be discharged by the obligee's acceptance of a contract in substitution for performance of that duty (§ 278, introductory note). A substituted contract "discharges the original duty and breach of the substituted contract by the obligor does not give the obligee a right to enforce the original duty" (Restatement of Contracts § 279). Where the substituted contract includes a new party, it is known as a novation (Restatement of Contracts § 280).

Here, it is undisputed that the parties did not sign a novation agreement. We conclude in light of appellant's arguments that there are triable issues of fact which cannot be resolved on this motion as to whether KBR accepted transfer of the contract to the CPA and IIG without recourse against the government. If KBR did, then, under the authorities cited above, it would no longer have standing under the CDA.

Appropriated Funds

The government argues that the Board also lacks jurisdiction over the appeal "because appropriated funds cannot be used to pay a judgment in connection with the task orders which were all funded with Iraqi funds" (mot. at 19). It states that although TO

Nos. 4 and 6 were originally awarded with appropriated funds, they were transferred to the CPA for administration and funded with DFI funds. Appellant responds that "the fact that some of the task orders were funded with DFI monies does *not* mean that appropriated funds cannot be used to pay a monetary award." It relies upon 41 U.S.C. § 612, the provision in the CDA stating that judgments against the government shall be paid from the permanent, indefinite appropriation known as the Judgment Fund. (App. opp'n at 15) We agree with appellant. "To the extent that the government is liable for CDA claims, the judgment fund is generally available." *South Carolina Public Service Authority*, ASBCA No. 53701, 04-2 BCA ¶ 32,651 at 161,605.

CONCLUSION

The government's motion to dismiss the appeal for lack of subject matter jurisdiction is denied subject to further development of the facts as discussed above. The Board does not reach appellant's cross-motion for summary judgment on the merits.

Dated: 23 November 2010

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I concur

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

I concur

CAROL N. PARK-CONROY
Administrative Judge
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. 56256, Appeal of Kellogg Brown & Root Services, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals