UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR PARTIAL SUMMARY JUDGMENT GRANTED:
June 1, 2020

CBCA 5961, 6322

MAYBERRY ENTERPRISES, LLC,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

James A. Sorenson and Michael R. Johnson of Ray Quinney & Nebeker P.C., Salt Lake City, UT, counsel for Appellant.

J. Ben Summerhays and Thomas M. Cordova, Office of the General Counsel, Department of Energy, Lakewood, CO, counsel for Respondent.

Before Board Judges **HYATT**, **LESTER**, and **O'ROURKE**.

LESTER, Board Judge.

These consolidated appeals involve a challenge by appellant, Mayberry Enterprises, LLC (Mayberry), to an agency default termination decision (CBCA 5961) and a demand by Mayberry for payment of monies to which it believes it is entitled (CBCA 5961 and 6322). Respondent, the Washington Area Power Administration (WAPA) (acting through the Department of Energy), requests that we grant summary judgment on a portion of Mayberry's

monetary demands, asserting that WAPA has already paid the requested monies to Mayberry's assignee pursuant to an assignment that WAPA agreed to recognize and that, even if the Board were to overturn the default termination, would remain valid and enforceable. For the reasons set forth below, we grant WAPA's motion for partial summary judgment.

Statement of Undisputed Facts

Contract Performance History

On May 27, 2016, Mayberry was awarded contract no. DE-WA0003012 (the contract) to construct a storage building and perform miscellaneous site work, including concrete paving, at a WAPA facility in Fort Peck, Montana. Under the contract's original terms, the building and concrete work were to be completed by March 4, 2017. American Contractors Indemnity Company (ACIC) was Mayberry's surety on the performance and payment bonds for the contract.

WAPA requested a price proposal from Mayberry on August 17, 2016, for additional work under the contract to add asphalt surfacing in areas around the Fort Peck facility. On September 6, 2016, ACIC, as surety, consented to a contract modification adding that asphalt work and agreed to the associated increase in potential liability. The contracting officer executed the modification on September 12, 2016. Through a subsequent modification, the completion date for the asphalt portion of the work was extended to June 16, 2017, but other work under the contract was still due to be completed by March 4, 2017.

On October 12, 2016, WAPA emailed Mayberry expressing concerns over Mayberry's ability to have asphalt installed due to coming winter weather, as well as slips in Mayberry's schedule, and requested a new schedule. Subsequently, Mayberry's subcontractor, Elk Valley, contacted WAPA indicating that Mayberry was not paying it. In addition, Elk Valley complained that Mayberry had tried to have the "Nucor building," a custom-engineered metal building system that Elk Valley had procured for the project and that WAPA had approved for the project at Mayberry's request, switched to Mayberry's control. Mayberry soon thereafter notified WAPA that it had terminated its subcontract with Elk Valley.

WAPA issued a cure notice to Mayberry on January 3, 2017, which, as revised on January 13, 2017, identified defects in the work that Mayberry had performed, including defects in the integrity of a concrete slab that Mayberry had laid, and raised questions about a weather-tight seal between the concrete slab and the Nucor building. After various communications between the parties, Mayberry proposed to substitute a building by General Steel for the previously approved Nucor building. On March 3, 2017, WAPA indicated that

it was willing to consider the proposed substitution, but that Mayberry would have to provide additional details. WAPA soon thereafter notified Mayberry that, because Mayberry had not completed the non-asphalt portion of the project that was due by March 4, 2017, WAPA would be assessing liquidated damages. By May 25, 2017, after an exchange of communications with Mayberry, WAPA's engineering department had approved Mayberry's use of the General Steel building (subject to compliance with several listed comments), while still maintaining WAPA's right to liquidated damages.

On July 7, 2017, Mayberry submitted invoice 6 to WAPA (although the invoice was dated June 30, 2017) requesting payment for asphalt paving and miscellaneous site work in the amount of $400,905.35, work that WAPA acknowledged Mayberry had previously completed. In addition to invoice 6, Mayberry also submitted an uncertified monetary claim to the WAPA contracting officer, dated July 7, 2017, seeking (1) the release of $41,000 in funds that WAPA had retained from prior payments to Mayberry and (2) an equitable adjustment of $87,990.24 for damages incurred as a result of a suspension of work, government-caused delays, and late payment. A copy of invoice 6 was attached to, but not mentioned in, the monetary claim.

Despite continuing questions about Mayberry's performance and liquidated damages, WAPA was preparing to pay invoice 6. On or about July 18, 2017, however, WAPA received a letter from ACIC in which ACIC asserted its right to all contract funds and payments under the contract. Accompanying the letter was a copy of a General Indemnity Agreement (GIA) that Mayberry had executed on December 17, 2014, assigning to ACIC, among other things, "[a]ll right, title and interest of [Mayberry] in, to or arising in any manner out of any Contract including, without limitation, the right to receive progress payments, payments on claims, changes or allowances, retained sums or any and all other monies due or to become due deriving in any manner from any Contract." Appeal File, Exhibit 123 at 6. The GIA further provided that the assignment "shall, at the Surety's election and without limiting the Surety's rights as otherwise provided at law or in equity or by this Agreement, be in addition to, but shall not in any way impair, any rights of subrogation which the Surety may have which rights of subrogation shall survive unimpaired by this assignment or by any exercise by the Surety of its rights hereunder." *Id.* ACIC informed WAPA that, pursuant to the terms of the assignment, all future payments under the contract should be sent directly to ACIC instead of Mayberry:

> Pursuant to the GIA, ACIC has an interest in all contract funds, including, without limitation, retained amounts, earned but unpaid contract monies, and unearned contract monies (hereinafter the "Contract Balances"). Accordingly, ACIC hereby requests that all future payments which constitute Contract Balances should be forwarded to ACIC . . . . Alternatively, ACIC requests that

> no further payments be made to or on behalf of Mayberry without prior notice to and consent from ACIC.

Id., § IV.4, at 6. Also accompanying ACIC's July 18, 2017, letter were documents titled "Federal Instrument of Assignment" and "Federal Notice of Assignment," both of which ACIC had executed as agent and attorney-in-fact for Mayberry under the terms of the GIA, that purported to appoint ACIC as "the true and lawful Attorney of [Mayberry] to demand, receive, and enforce payments" under the contract and again demanded that "[p]ayments due or to become due under this Contract . . . be made to [ACIC]." *Id.* at 17-18.

WAPA regarded invoice 6 as payable because Mayberry had completed the work covered by the invoice, but, in accordance with ACIC's request, the agency did not deliver payment to Mayberry. By email dated July 26, 2017, WAPA informed Mayberry of ACIC's payment demand pursuant to the assignment and indicated that payment would be delayed until WAPA's review of the validity of the assignment was complete.

On August 9, 2017, WAPA, still concerned about Mayberry's contract performance, issued a show cause notice asking Mayberry to justify why its contract should not be terminated for default. Mayberry responded on August 22, 2017, contesting WAPA's assertion that Mayberry caused delays on the project. On September 8, 2017, the WAPA contracting officer terminated Mayberry's contract for default.

Subsequently, on or about January 29, 2018, WAPA entered into a tripartite tender agreement with ACIC and ACIC's proposed contractor for taking over and completing the terminated contract work. Through that agreement, WAPA committed to paying ACIC and its completion contractor all funds remaining on Mayberry's terminated contract. The tender agreement indicated that there was a total remaining balance of $836,006.76 in unpaid funds on that contract, broken down as follows: $400,905.35 in monies that Mayberry had earned but not yet been paid (the amount due under invoice 6); an additional $41,000 that WAPA was holding in retainage; and $394,101.41 that Mayberry had never earned or billed. Under the terms of the tender agreement, WAPA was to pay $689,470 of that $836.006.76 balance to the completion contractor and the remainder—$146,536.76—to ACIC.

<u>Mayberry's Appeal to the Board</u>

Mayberry filed its first notice of appeal with the Board on December 7, 2017, challenging the contracting officer's default termination and appealing the contracting officer's "deemed denial" of its July 7, 2017, monetary claim. In its complaint in that appeal, docketed as CBCA 5961, Mayberry included a demand for payment of $400,905.35 for the work covered by invoice 6, release of the $41,000 retainage, and payment of the $87,990.24

equitable adjustment. In response to WAPA's motion to dismiss, the Board dismissed the $400,905.35 monetary request for lack of jurisdiction because Mayberry had never submitted it as a certified claim, but found jurisdiction to entertain Mayberry's request for release of the $41,000 retainage and for the $87,990.24 equitable adjustment. *Mayberry Enterprises, LLC v. Department of Energy*, CBCA 5961, 18-1 BCA ¶ 36,998.

Subsequently, on July 9, 2018, Mayberry submitted a certified claim to the WAPA contracting officer seeking payment of the $400,905.35 invoice 6 amount, which the contracting officer denied on September 7, 2018.[1] On December 6, 2018, Mayberry appealed that final decision to the Board, and the Board consolidated that appeal, docketed as CBCA 6322, with CBCA 5961. After discovery concluded, WAPA filed its motion for partial summary judgment, seeking to dismiss Mayberry's claims for the $41,000 retainage and the $400,905.35 invoice 6 payment because the payments were assigned to ACIC. WAPA's motion does not address Mayberry's claim for an additional $87,990.24 equitable adjustment.

Discussion

Standard of Review

Pursuant to Board Rule 8(f), "[a] party may move for summary judgment on all or part of a claim or defense." 48 CFR 6101.8(f) (2019). Partial summary judgment, at the request of a party, is appropriate if there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) regarding the issue at hand and the moving party is entitled to judgment as a matter of law. *San Carlos Irrigation & Drainage District v. United States*, 111 F.3d 1557, 1562 (Fed. Cir. 1997); *Baltimore Baseball Club, Inc. v. United States*, 481 F.2d 1283, 1284 (Ct. Cl. 1973). "The government, as moving party, bears the burden of demonstrating the absence of genuine issues of material facts" on a request for partial summary judgment. *San Carlos Irrigation*, 111 F.3d at 1562.

The Validity and Effect of Mayfair's Assignment

As set forth in the Assignment of Contracts Act (Contracts Act), 41 U.S.C. § 6305 (2018), "[t]he party to whom the Federal Government gives a contract or order may not

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[1] In our decision dated March 13, 2018, we interpreted Mayberry's request for $400,903.35 to be related to costs incurred as a result of the impossibility of design specifications that resulted in the default termination. In its claim of July 9, 2018, however, Mayberry makes clear that the dollar figure represents the payment to which Mayberry believes itself entitled through invoice 6.

transfer the contract or order, or any interest in the contract or order, to another party." *Id.* § 6305(a). The purpose of the Contracts Act and its sister statute, the Assignment of Claims Act, 31 U.S.C. § 3727 (together known as the "Anti-Assignment Acts"), is to "prevent[] individuals or companies from accumulating claims against the Government and of thereby requiring the Government to deal with persons or concerns other than the party the Government agreed to deal with." *Summit Commerce Pointe, LLC v. General Services Administration*, CBCA 2652, 13 BCA ¶ 35,370, at 173,569. The only exception written into the Contracts Act provides that, in appropriate circumstances, "amounts due from the Federal Government under a contract may be assigned to a bank, trust company, Federal lending agency, or other financing institution." 41 U.S.C. § 6305(b)(1). ACIC, as a surety, does not fall within this exception to the Contracts Act's preclusion on assignments. *See Fireman's Fund Insurance Co. v. England*, 313 F.3d 1344, 1350 (Fed. Cir. 2002) (rejecting argument that a surety is a bank, trust company, or financial institution under the Contracts Act).

It is well-settled, however, that, "[d]espite the bar of the Anti-Assignment statute . . . , the Government, if it chooses to do so, may recognize an assignment." *Maffia v. United States*, 163 F. Supp. 859, 862 (Ct. Cl. 1958). The Contracts Act has long "been interpreted as being solely for the Government's own benefit and therefore as permitting the Government to assent to and recognize an assignment where it seems appropriate." *G.L. Christian & Associates v. United States*, 312 F.2d 418, 423 (Ct. Cl. 1963); *see Vermont Yankee Nuclear Power Corp. v. Entergy Nuclear Vermont Yankee, LLC*, 683 F.3d 1330, 1339 (Fed. Cir. 2012) ("Our precedents have established that the government may consent to or waive any objections it may have to assignments that would otherwise be in violation of the Contracts Act."). "An assignment of contracts could involve an assignment of contract performance or of a lesser interest in a contract such as the right to receive payments from a contract." *Insurance Co. of the West v. United States*, 100 Fed. Cl. 58, 65 (2011) (citations omitted). "[W]here 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). Whether the Government has accepted an assignment is determined "by an objective look at the totality of the circumstances." *Insurance Co. of the West*, 100 Fed. Cl. at 70.

Although the Government is not obligated to accept and recognize an assignment to a surety set forth in a GIA, *Fireman's Fund*, 313 F.3d at 1349-50, the agency plainly elected to do so here, at least to the extent that it recognized the contract funds assignment.[2] It is not

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[2] The plain language of Mayberry's GIA purports to assign not only Mayberry's contract payments to ACIC, but also, in a separate section of the GIA, any causes of action or claims arising out of or connected with the contract that Mayberry may have against the

clear from the record here why ACIC invoked its assignment rights before WAPA had terminated Mayberry for default, but, whatever the reason, WAPA did not abuse its discretion in withholding payment on invoice 6 after receiving ACIC's invocation, giving itself time to review the matter in light of the potential financial consequences of paying the wrong entity. *See D&H Distributing Co. v. United States*, 102 F.3d 542, 547 (Fed. Cir. 1996) ("The promisor can be held liable on that obligation to the assignee if the promisor makes payments to the assignor, rather than to the assignee in accordance with the terms of the assignment."); *Central National Bank of Richmond v. United States*, 91 F. Supp. 738, 741 (Ct. Cl. 1950) ("The Government having received timely notice of plaintiff's assignment paid [the assignor] at its peril. . . . And where an erroneous payment is made by the Government it is no bar to the rightful claimant."). After terminating Mayberry's contract, WAPA then entered into a tender agreement with ACIC in which it expressly agreed to divide the entirety of the remaining contract balance between ACIC and the completion contractor that ACIC proposed. That amount included both the $400,905.35 invoice 6 payment and the $41,000 retainage.

That tender agreement reflects WAPA's acceptance of Mayberry's assignment to ACIC, even though the assignment is not specifically mentioned in it. Although the Federal Acquisition Regulation (FAR) prefers a tripartite takeover agreement between the Government, the surety, and the defaulted contractor, *see* FAR 49.404(d) (48 CFR 49.404(d) (2019)), the tender agreement here, when coupled with Mayberry's previously executed assignment to ACIC, effects a similar result.[3] When a surety executes a takeover agreement

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Government. Exhibit 123 at 6 (§ IV.A.6). Generally, "an assignment of only the right to receive payments from a claim does not carry with it the right to assert the assignor's claims under the CDA," and, "[a]s the Anti-Assignment Acts make apparent, an assignment of the right to receive payments is different from an assignment of the right to assert claims." *Insurance Co. of the West*, 100 Fed. Cl. at 65. ACIC only formally noticed WAPA of its assignment right to contract payments and funds, and WAPA has not asserted that, in addition to accepting the contract funds assignment, it also accepted the separate contract claims assignment. On the current record, then, we have no basis for questioning Mayberry's ownership of the additional $87,990.24 monetary claim that it raised in CBCA 5961, and we leave to later proceedings the question of, were Mayberry to receive judgment in its favor on that claim, who (between Mayberry or ACIC) would be the appropriate entity to receive payment.

[3] Although tenders are not expressly mentioned in the FAR, the FAR does not prohibit them. William Schwartzkopf, *Practical Guide to Construction Contract Surety Claims* § 14:08 (3d ed. 2020). Typically, "[s]ureties cite FAR 49.405 as authority for the contracting officer to consider a tender solution." *Id.*

with the Government following a default termination, "the money available to the surety generally would include all funds held by the Government on the contract, including withheld percentages and progress payments, whether earned prior to or subsequent to the contractor's default." *United States Surety Co. v. United States*, 83 Fed. Cl. 306, 312 (2008) (quoting *Priority to Remaining Proceeds of Contract Between Veterans Administration & Kathy's Kranes Corp.*, B-225115, 87-1 CPD ¶ 191 (Feb. 20, 1987)). The same is true with a tender agreement. "In the surety industry, a tender is the surety's offer to the obligee of a substitute contractor who will fulfill the performance bond obligations of the surety if the principal is terminated, thereby resolving most or all of the performance bond obligations," and a tender agreement is the document that memorializes the surety's tender offer, the Government's acceptance, and the terms of the new contract between the completion contractor and the Government. William Schwartzkopf, *Practical Guide to Construction Contract Surety Claims* § 14:01 (3d ed. 2020). The tender agreement essentially acts as a settlement between the Government and the surety. Although ACIC's tender agreement with WAPA does not expressly mention the contract funds assignment in the GIA, it is clear that WAPA accepted that assignment by agreeing to distribute all remaining contract funds to ACIC and the completion contractor and, further, by actually paying the funds to ACIC and the completion contractor rather than to Mayberry.

Mayberry argues that, because the direct payment to ACIC under the tender agreement was only $146,536.76, it would be a windfall to the Government to allow it to avoid paying Mayberry the $41,000 retainage and the remainder of the $400,905.35 due under invoice 6. Yet, ACIC, through the terms of the tender agreement, directed WAPA to split the contract balance payments between ACIC and the completion contractor. In light of Mayberry's contract funds assignment to ACIC and WAPA's acceptance of that assignment, ACIC, not Mayberry, had the right to determine how those funds would be distributed, and ACIC acted within its rights by making a tender offer, which WAPA accepted, to have some of that money paid directly to the completion contractor. Mayberry's assertion that WAPA is still holding the money is wrong, and, in light of the assignment to ACIC, Mayberry has no right to make WAPA submit a duplicate payment directly to Mayberry.

We also disagree with Mayberry's argument that, if the Board overturns the default termination, Mayberry could be entitled to recover these payments. Mayberry's rights are governed by the assignment that it executed. GIAs, like the one that Mayberry executed, are typically "drafted in such a way as to permit the surety to invoke indemnity rights without having to establish that the principal was in actual default of the bonded contract." 3 Philip L. Bruner & Patrick J. O'Connor, Jr., *Bruner & O'Connor on Construction Law* § 10:104 (updated Jan. 2020). Mayberry's GIA permitted ACIC to invoke the assignment of contract proceeds and demand direct payment from WAPA (assuming WAPA accepted the assignment) even before any "event of default" occurred. Further, even if the assignment

were tied to default, Mayberry's GIA with ACIC, like many GIAs, "define[d] an event of default under [the] indemnity agreement [to] be the [Government's] declaration of default, rather than actual default." *Id.*; *see* Exhibit 123 (Mayberry's GIA, defining "Event of Default" as including "the declaration by [WAPA] that [Mayberry] is in default under [the] Contract, irrespective of whether or not [Mayberry] is actually in default"). Mayberry's agreement with ACIC plainly allowed ACIC to obtain all payments, at the latest, upon a default notice, subject to whatever indemnification provisions, as between Mayberry and ACIC, are contained within the GIA. Regardless whether a particular assignment comports with the Anti-Assignment Acts, it is still enforceable between parties to the assignment, at least until the United States elects to challenge it. *See United Pacific Insurance Co. v. United States*, 358 F.2d 966, 969 (Ct. Cl. 1966) ("There is no need to discuss whether the assignment in question complies with all the provisions of the Assignment of Claims Act, for whether or not the transaction is valid as against the United States, it is in any event effective and binding on the parties."); *Danning v. Mintz*, 367 F.2d 304, 306 (9th Cir. 1966) (rejecting argument that assignment was null and void as between assignor and assignee because Anti-Assignment Act does not apply vis-a-vis private parties). Here, Mayberry assigned its contract payments to ACIC without limitation, ACIC decided to enforce the assignment, and WAPA agreed to recognize it. In such circumstances, Mayberry is bound by its agreement assigning its contract payments to ACIC. *See* 6 Am. Jur. 2d *Assignments* § 155, at 245 (2004) (as against an assignee, an assignor is estopped from maintaining the inequitable position of nonassignability).

Having found WAPA's acceptance of Mayberry's contract funds assignment to ACIC enforceable, we need not consider WAPA's alternative argument that, under the doctrine of equitable subrogation, its payment obligations to ACIC displaced Mayberry's payment rights.

Decision

For the foregoing reasons, WAPA's motion for partial summary judgment is **GRANTED**. Mayberry may not recover the $41,000 retainage or the $400.905.35 invoice 6 payment from WAPA. The issues that remain before the Board in this appeal are the validity of WAPA's default termination and Mayberry's $87,990.24 monetary claim. The Board will schedule further proceedings in these consolidated appeals by separate order.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

We concur:

Catherine B. Hyatt
CATHERINE B. HYATT
Board Judge

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge