



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR SUMMARY RELIEF DENIED: September 22, 2009

CBCA 1242

GENERAL HEATING & AIR CONDITIONING, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Michael F. Copley, Mark E. Landers, and Kenley S. Maddux of The Copley Law Firm, LLC, Galloway, OH, counsel for Appellant.

Mel E. Myers, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **STERN**, **BORWICK**, and **VERGILIO**.

BORWICK, Board Judge.

Respondent moves for summary relief in this construction case, alleging that appellant--General Heating and Air Conditioning, Inc. (GHAC)--violated the Anti-Assignment Act, 41 U.S.C. § 15 (2006), because its subcontractor and teaming partner--Allen Ballew General Contracting (ABGC)--acted in effect as the prime contractor and responsible party, with GHAC having a minimal role in contract performance. Respondent seeks dismissal of the appeal. Appellant opposes the motion, arguing that respondent has not shown a violation of the Anti-Assignment Act.

We agree with appellant. Appellant has placed in issue respondent's alleged undisputed facts. The undisputed facts that remain do not demonstrate a violation of the

Anti-Assignment Act. Because respondent has not shown on the present record a violation, the Board denies the motion.

Background

To put this matter in context, we state some background information. In April 2005, the Government awarded a contract for the renovation of the fourth floor of the United States Marshall's Office, United States Courthouse, Columbus Ohio. Appeal File, Exhibit 2. The award document was signed by the contracting officer and Mr. Jack Patterson, president of GHAC. *Id.*, Exhibit 4. On May 2, 2005, appellant informed respondent that appellant delegated Darin Law (a GHAC employee) as project manager and Allen Ballew as assistant project manager. *Id.*, Exhibit 7. Mr. Ballew was employed by ABGC. *Id.*, Exhibit 9. On May 2, 2005, appellant informed respondent that it had designated Allan Hammond as its job representative or project superintendent. *Id.*, Exhibit 8. On May 20, the contracting officer wrote appellant a letter stating respondent's understanding that GHAC would hire Mr. Ballew to serve as assistant project manager, but that Mr. Law would be in charge of all communications written or verbal, that Mr. Law would attend all progress meetings and be involved in all change order negotiations with GSA, and that Mr. Ballew as assistant project manager would coordinate all project related issues through Mr. Law. *Id.*, Exhibit 10.

Respondent's alleged undisputed material facts and appellant's response.

Respondent presents alleged undisputed facts which, taken alone, may be insignificant, but taken together are intended by respondent to suggest that ABGC was the real contractor with GHAC having minimal involvement in the project. Respondent states that fourteen of the fifteen subcontracts were in the name of ABGC. Respondent's Statement of Undisputed Facts ¶ 1. Mr. Patterson stated in a telephone call to GSA that he would hire Mr. Ballew to run the project. *Id.* ¶ 2. Mr. Ballew was on the payroll of GHAC for a week. *Id.* ¶ 3.

Respondent states as an undisputed fact that all employees apart from Mr. Law and administrative assistant Melissa Mehan were former employees of ABGC and were employed by GHAC for only this project to meet the minimum work percentage threshold required in the contract with GSA. The evidence relied upon for this statement--an e-mail message and deposition testimony--do not support the statement that all employees save for two were former employees of ABGC and that the employees were hired to meet minimum work requirements. The e-mail message is simply a breakdown of the percentage--12.93--of the contract work to be performed by GHAC. Respondent's Motion for Summary Relief, Exhibit 3. The deposition testimony of Mr. Patterson concerns not keeping Mr. Ballew on GHAC's payroll because he was not benefitting the twelve percent requirement. The

deposition testimony does not address whether all but two GHAC employees were former employees of ABGC. Deposition of Jack Patterson (June 9, 2009) at 47-48.

Respondent states as an undisputed fact that Mr. Hammond was and is a current employee of ABGC and was fired by Mr. Ballew of ABGC during the project, and that Mr. Hammond was paid at various times by both GHAC and ABGC. Respondent's Statement of Undisputed Facts ¶ 5. In partial support of the statement that ABGC paid Mr. Hammond for his work as project superintendent, respondent relies upon its Exhibit 4, which it believes is an ABGC payroll record. *Id.*

Appellant, based upon the affidavits of Mr. Hammond and Mr. Ballew, disputes that Mr. Ballew ever fired Mr. Hammond as project superintendent. In their affidavits, both Mr. Hammond and Mr. Ballew deny that Government-alleged fact. Affidavit of Allan Hammond (Sept. 9, 2009) ¶ 3; Affidavit of Allen Ballew (Sept. 9, 2009) ¶ 5.

Appellant maintains that GHAC paid Mr. Hammond significant amounts for his work on the project. Appellant's Statement of Undisputed Facts ¶ 2; Affidavit of Jack Patterson (Sept. 9, 2009) ¶ 5. Appellant also states that: (1) GHAC charged Mr. Hammond with supervision and administration of the project; (2) Mr. Hammond exercised authority on behalf of GHAC; (3) Mr. Hammond possessed the authority to direct ABGC's work; (4) ABGC had no authority over Mr. Hammond regarding the project; and (5) Mr. Hammond was on site daily supervising all work, including the heating, ventilation, and air conditioning (HVAC) subcontract. Appellant's Statement of Undisputed Facts ¶¶ 3-7; Hammond Affidavit ¶¶ 4, 6, 8; Patterson Affidavit ¶ 10. Appellant also disputes respondent's use of respondent's Exhibit 4 to establish the alleged undisputed fact at respondent's statement of undisputed facts ¶ 5 that GHAC at times paid Mr. Hammond's salary. Appellant says that document deals with expense reimbursement, not salary payment. Appellant's Statement of Undisputed Facts ¶ 11; Ballew Affidavit ¶ 6.

Appellant contends that GHAC authorized Mr. Ballew to act on its behalf through a delegation of authority, and that the delegation did not depend on the frequency of compensation. Appellant's Statement of Undisputed Facts ¶ 15; Ballew Affidavit ¶ 4; Patterson Affidavit ¶¶ 13-15. Appellant states that Mr. Patterson, as the president of GHAC, had the ability to control and direct Mr. Ballew's actions on behalf of GHAC. Appellant's Statement of Undisputed Facts ¶ 16; Patterson Affidavit ¶ 13.

Appellant also disputes that Mr. Ballew exercised day-to-day control over the project on behalf of GHAC. Appellant acknowledges that Mr. Ballew provided administrative support for the project on behalf of GHAC. Appellant's Statement of Undisputed Facts ¶ 17; Ballew Affidavit ¶ 4. However, appellant says that Mr. Ballew did not supervise work or

personnel on the project and that Mr. Ballew was rarely on the project site. Appellant's Statement of Undisputed Facts ¶¶ 18, 19; Ballew Affidavit ¶ 9. Appellant states that Mr. Ballew was never authorized to and never did execute contract modifications on behalf of GHAC affecting time or money. Appellant's Statement of Undisputed Facts ¶ 22; Ballew Affidavit ¶ 11; Patterson Affidavit ¶ 15. Furthermore, appellant maintains, GHAC never delegated any authority to the corporate entity ABGC and that Mr. Ballew never asked Mr. Patterson to perform any act on behalf of ABGC. Appellant's Statement of Undisputed Facts ¶¶ 24, 25; Patterson Affidavit ¶ 16; Ballew Affidavit ¶ 12.

Additionally, appellant, supported by affidavit, in its own statement of uncontested facts represents the following: GHAC obtained bonds for the project in its own name. Appellant's Statement of Undisputed Facts ¶ 28. GHAC used its own name in communicating with GSA on the project. *Id.* ¶ 29. GHAC filed the claim in its own name. *Id.* ¶ 30. GHAC was required by the contract to perform 12% of the work on the project with its own forces and actually performed nearly 13% of the work using its own forces. *Id.* ¶¶ 32, 33. All of the work not performed by GHAC was performed by two of appellant's subcontractors, one of which was ABGC. *Id.* ¶ 34. GHAC paid for all labor and materials used in its work. *Id.* ¶ 37. ABGC did not finance performance of GHAC's scope of work. *Id.* ¶ 40. GHAC bore the risk of errors by unbonded subcontractors and workmen's compensation claims by every project employee, and GHAC's president signed all checks related to performance of the project. *Id.* ¶¶ 42-44.

The assertions in respondent's statement of undisputed facts that are not specifically disputed by appellant are: (1) Mr. Patterson stated that Mr. Ballew would be running the project, Respondent's Statement of Undisputed Facts ¶ 7; (2) by delegation of authority and through a gentleman's agreement, Mr. Patterson gave Mr. Ballew full power to execute work on the project, *Id.* ¶ 8;¹ and (3) Mr. Ballew used GHAC stationery while not employed by GHAC, and Mr. Ballew used ABGC stationery and e-mail addresses while being designated as GHAC's assistant project manager, *Id.* ¶¶ 8, 9.

¹ Even though appellant does not specifically refute that statement of fact, we note that the delegation to Mr. Ballew was circumscribed in that Mr. Patterson reserved to himself the authority to execute contract modifications involving changes to contract time and money. *See* Appeal File, Exhibit 7.

Discussion

Standards for summary relief

We recently once again set forth the standard for resolving motions for summary relief:

Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the non-movant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Nevertheless, to defeat a motion for summary relief, the nonmoving party must come forward with specific facts showing the existence of a genuine issue for trial.

AFR & Associates, Inc. v. Department of Housing and Urban Development, CBCA 946, slip op. at 9 (Aug. 7, 2009). A fact is considered to be material if it will affect the Board's decision, and an issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant after a hearing. *Charles Engineering Co. v. Department of Veterans Affairs*, CBCA 582, et al., 08-2 BCA ¶ 33,975, at 168,055-56 (citing *Fred M. Lyda v. General Services Administration*, CBCA 493, 07-2 BCA ¶ 33,631).

The merits of the motion

We turn now to the merits of respondent's motion for summary relief. The Anti-Assignment Act provides in pertinent part:

No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

41 U.S.C. § 15(a).

A purpose of the Anti-Assignment Act is to prevent fraud and multiple litigation. *United International Investigative Services v. United States*, 26 Cl. Ct. 892, 898 (1992). Another purpose is to: "secure to the United States the personal attention and services of the contractor and to render [it] liable to punishment . . . under the same act for any fraud or

neglect of duty[.]” *Francis v. United States*, 11 Ct. Cl. 638, 640 (1875). In *Francis*, the contractor had transferred his complete interest in the contract through a power of attorney to a third party. *Id.* The Court deemed the transfer a full and complete assignment of an important interest covering all the money to be received under the contract. *Id.* at 641. In *McPhail v. United States*, 181 F. Supp. 251 (Ct. Cl. 1960), the Court found a violation of the Anti-Assignment Act because the contractor, again through a power of attorney, had contracted away its right to perform the contract, forcing the Government to deal with the assignee. *Id.* at 254-55. In *NGC Investment and Development, Inc. v. United States*, 33 Fed. Cl. 459 (1995), the court found a violation of the Act after NGC, over the express objections of the Government, transferred its interest in the contract to another corporation, with NGC having nothing more to do with contract performance. *Id.* at 463.

The Anti-Assignment Act, however, does not prohibit a government contractor from forming joint ventures or partnerships to perform a contract. *Hobbs v. McLean*, 117 U.S. 567, 576-77 (1886). A joint venture agreement that serves as a performance vehicle, not an assignment, does not violate the Anti-Assignment Act, particularly when the agreement recognizes the contractor’s predominate role in administration of the contract and does not explicitly mention assignment or transfer of the contract. *Great Lakes Dredge & Dock Co.*, ASBCA 53929, et al., 04-1 BCA ¶ 32,518, at 160,863.

Respondent argues that ABGC, through Mr. Ballew, was actually the real contractor, that Mr. Ballew essentially ran the project for ABGC, and that this arrangement violated the Anti-Assignment Act:

[N]o degree of control and responsibility was maintained by GHAC and the Government was prejudiced thereby. Allen Ballew managed the project for GHAC and managed the project for ABGC. He in effect processed his own change orders, processed his own payments and ran the job himself. This made management of the contract difficult because when the Government needed something done, needed action taken, needed information, GHAC was unable or unwilling to provide it because it exercised no control over its subcontractor ABGC. GHAC did not even manage the one contract it claims it held, the HVAC contract. Allen Ballew supervised and managed that contract as well. In sum, GHAC’s admission that it did not manage or supervise the HVAC contract makes for a fatal admission. Once accepted, one must conclude that combined with the plain fact that ABGC managed all the other subcontracts and hired and supervised all of the laborers, makes plain that GHAC, in terms of management control and responsibility, had zero control and little, if any, involvement, in the project.

Respondent's Memorandum in Support of Motion for Summary Relief at 17 (citations omitted).

Appellant concedes that it and ABGC had a close teaming and subcontractor relationship on the project, but argues that such an arrangement is not forbidden by the Anti-Assignment Act. Appellant's Opposition at 14-15. Further, appellant maintains that neither Mr. Ballew nor ABGC controlled the project:

GSA's claim that Allen Ballew or ABGC exerted total control over the entire project is false. Allan Hammond, Darin Law and Jack Patterson all contributed significantly to managing the project. All were employed by and acted on behalf of GHAC. Allen Ballew had limited authority to act on behalf of GHAC. For example, he could not sign contract modifications for time or money. He did not control or manage GHAC's other subcontractor, Columbus, Heating & Ventilating. He was rarely on-site and did not supervise or direct the work. Jack Patterson retained the power to control and direct Allen Ballew's actions on GHAC's behalf.

Id. at 16-17 (citations omitted).

At this stage, the Government has not established the incorrectness of appellant's asserted facts concerning ABGC's and Mr. Ballew's involvement in the project. Appellant paints ABGC as an involved subcontractor, not an assignee of the contract. Although respondent says that ABGC through Mr. Ballew supervised contract performance, appellant disputes the extent of Mr. Ballew's actual involvement in the project. Appellant points to the significant contract work performed by it as well as its president's responsibility for oversight of the contract performance, including contract actions involving time and money. Regarding Mr. Ballew individually, appellant maintains that Mr. Ballew reported to appellant's president, Mr. Patterson, and that Mr. Ballew's duties for GHAC were limited, with others employed by appellant performing significant roles in contract administration. Appellant denies that Mr. Ballew supervised Mr. Hammond, the job representative.

In short, respondent has not presented in its motion a document or series of documents that could be construed as an actual assignment of the contract from appellant to ABGC. Further, because the material facts are disputed, we must accept appellant's plausible version of the facts concerning the degree of control, if any, possessed by ABGC and Mr. Ballew. According to appellant's version of the facts, appellant remained the actual contractor, with GHAC taking ultimate responsibility for the contract and taking the risks of contract performance or non-performance.

Decision

Respondent's motion for summary relief is **DENIED**.

ANTHONY S. BORWICK
Board Judge

We concur:

JAMES L. STERN
Board Judge

JOSEPH A. VERGILIO
Board Judge