UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: March 27, 2024

CBCA 7807

GARDNER CONSTRUCTION & INDUSTRIAL SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Michael P. Sams and Jessica A. Hartman of Kenney & Sams, P.C., Southborough, MA, counsel for Appellant.

Marnie Ajello, Office of the Solicitor, Northeast Region, Department of the Interior, Boston, MA, counsel for Respondent.

Before Board Judges **LESTER**, **RUSSELL**, and **GOODMAN**.

Opinion for the Board by Board Judge **GOODMAN**. Board Judge **LESTER** concurs.

GOODMAN, Board Judge.

Appellant, Gardner Construction & Industrial Services, Inc. (Gardner), appeals a decision of a contracting officer of respondent, Department of the Interior, to terminate appellant's contract for default. Respondent filed a motion to dismiss the appeal, asserting that the Board lacks subject matter jurisdiction because the entity that filed the appeal is not the same entity with which respondent contracted and is not in privity with the Government and that the contract at issue has not been validly assigned. We deny the motion.

Background[1]

On September 20, 2018, Gardner and respondent entered into a contract (the contract) to replace a failing fire suppression system at the Springfield Armory National Historic Site (SPAR or the project). Complaint ¶ 4; Appellant's Exhibit 1. The contract's original performance period was extended twelve times, finally to May 31, 2022, through contract modifications. Complaint ¶¶ 6, 7.

Gardner alleges that the contract work "was delayed by ongoing discussions between the parties regarding project equipment that continued past the May 31, 2022, Performance Period." Complaint ¶ 8. Gardner further alleges that respondent "waived the Performance Period" and, through its conduct after the Performance Period, "waived its right to terminate the Contract for default." *Id.* ¶¶ 9, 18, 22. Gardner alleges that it continued working towards completion of the contract in good faith and in reliance upon the respondent's continued waiver of the performance period. *Id*. ¶ 10; *see also id.* ¶ 16.

Respondent issued a notice of termination for default dated March 29, 2023. Appeal File, Exhibit 92.

On June 23, 2023, Gardner filed its notice of appeal of the termination of the contract at this Board. Gardner alleges that respondent improperly terminated the contract, as Gardner "did not refuse or fail to prosecute the Contract Work or complete the Contract Work within the Performance Period because the Performance Period was waived." Complaint ¶¶ 11, 23, 21.

Respondent filed a motion to dismiss the appeal for lack of jurisdiction, pursuant to Board Rule 8(b). 48 CFR 6101.8(b) (2023). The motion alleges that, while it is "still operating under the same company name, Appellant is not the same company with which the Government originally agreed to contract. The Board lacks jurisdiction because Appellant is not in privity with the Government." Respondent's Motion to Dismiss at 1.

Respondent supports this allegation by noting that William Fountain founded Gardner in 1992.[2] According to appellant's 2018 Annual Report, Mr. Fountain was Gardner's

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[1] Exhibits to appellant's opposition to respondent's motion to dismiss are referred to as appellant's exhibits. Exhibits to respondent's motion to dismiss are referred to as respondent's exhibits.

[2] Gardner's original name was Gardner Engineering, Inc. In 2005, the name was amended to Gardner Construction & Industrial Services, Inc. Respondent's Exhibits 1, 2.

president, treasurer, and director. Respondent's Exhibit 4 at 1. On January 4, 2022, Mr. Fountain sold all existing shares of corporate stock of Gardner to Kurt Toomey. Respondent states:

> [T]he company that actually contracted with the Government, Gardner, has changed ownership and management, and its operations have wound down or, possibly, ceased. The result of these changes is that the version of Gardner that currently exists—Appellant—would not be in privity with the Government unless Appellant could show that it was validly assigned [the contract], and, as explained below, it has not. Moreover, it appears that, substantively, Appellant is either Westside Enterprises or Mr. Toomey individually, neither of whom have privity with the Government. Accordingly, the Board lacks jurisdiction to hear Appellant's case.

Respondent's Motion to Dismiss at 8.

Respondent offers additional facts in support of its motion. Gardner's phone numbers are not in operation, and the business address listed on its corporate filings and in its complaint in this appeal is occupied by a different tenant. Gardner's current address is one used by another company, Westside Enterprises, Inc. (Westside). Respondent's Motion to Dismiss at 5. Mr. Toomey, the person who purchased the existing shares of Gardner, and who signed the notice of appeal as President of Gardner, uses an email address with the domain "westsideenterprises.com," as does Gardner's employee, Brian Hobbs, who worked on the contract at issue. *Id*. at 6. Mr. Toomey's current construction supervisor license, issued by the Massachusetts Office of Public Safety and Inspections, is associated with Westside only. Respondent's Exhibit 29. Mr. Toomey's biography on Westside's website does not mention Gardner and his LinkedIn page also does not reference Gardner. Respondent's Exhibits 37, 38. Respondent also points out that William Fountain's construction supervisor license expired in August 2022. Respondent's Exhibit 40.

Further, respondent asserts that appellant "has not shown that Gardner's contracts were transferred or assigned to it as a result of the sale of the company. An entity that acquires a government contractor does not thereby become a government contractor itself unless it can establish that the underlying government contracts were validly assigned to it." Respondent's Motion to Dismiss at 11. Respondent maintains that since appellant is not the same company that entered into the contract, it is not in privity with respondent and has not

validly been assigned the contract at issue in violation of the Anti-Assignment Act.[3] Respondent asserts that appellant is not a "contractor" pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), and that the Board lacks jurisdiction over this appeal.

In response, appellant argues that the sale of stock by Mr. Fountain to Mr. Toomey did not change the identity of the appellant, and the change of ownership did not violate the Anti-Assignment Acts because it came within an exception to the Acts—a change of ownership by operation of law:

> Gardner's change of ownership did not violate the Anti-Assignment Acts because it was by "operation of law." Moreover, Gardner rejects Respondent's characterizations that Gardner is not "essentially the same entity" as it was when Gardner entered into the contract such that its ability to perform the Contract is properly called into question. To the contrary, Gardner has been completing projects over the last twelve months and repeatedly has asserted to the Respondent that it is ready, willing, and able to complete the Contract. Therefore, where Gardner is the original contractor, and its sale did not violate the Anti-Assignment Acts, this Board properly has jurisdiction over this matter.

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[3] The Assignment of Contracts Act, 41 U.S.C. § 6305, and the Assignment of Claims Act, 31 U.S.C. § 3727, are frequently discussed together (the Anti-Assignment Acts), since the two Acts generally share common concerns—to prevent fraud, particularly the buying up of claims against the Government; to protect the Government from having to deal with multiple persons or strangers to the contract; and to eliminate conflicting demands for payment and chances of multiple litigation and liability. *Merlin International, Inc. v. Department of Homeland Security*, CBCA 1012, et al., 11-2 BCA ¶ 34,869, at 171,510, *aff'd*, 705 F.3d 1332 (Fed. Cir. 2013). The Assignment of Contracts Act provides:

> (a) GENERAL PROHIBITION ON TRANSFER OF CONTRACTS.—The party to whom the Federal Government gives a contract or order may not transfer the contract or order, or any interest in the contract or order, to another party. A purported transfer in violation of this subsection annuls the contract or order so far as the Federal Government is concerned, except that all rights of action for breach of contract are reserved to the Federal Government.

41 U.S.C. § 6305(a).

Appellant's Opposition to Respondent's Motion to Dismiss at 3-4.

Discussion

The issue raised by respondent's motion cannot be resolved on a motion to dismiss for lack of jurisdiction but must be decided by a decision on the merits of the case. In *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346 (Fed. Cir. 2011), the Court of Appeals for the Federal Circuit reversed a decision of this Board, which had dismissed an appeal on a motion to dismiss for lack of subject matter jurisdiction. In reversing that decision, the Court held that jurisdiction under the CDA "'requires no more than a non-frivolous *allegation* of a contract with the government." *Id.* at 1353 (citing *Lewis v. United States*, 70 F.3d 597, 602, 604 (Fed. Cir. 1995); *Gould, Inc. v. United States*, 67 F.3d 925, 929–30 (Fed. Cir. 1995)).[4]

Citing *Engage Learning*, the Court of Federal Claims held, in *Liberty Ammunition, Inc. v. United States*, 101 Fed. Cl. 581 (2011), that a party claiming to have a contract with the Government by operation of law need only allege the existence of a contract as a basis of relief. In that case, as in the instant case, the Government questioned whether the contract at issue had been validly assigned to the party claiming relief. The court stated:

> Here, Liberty has presented a non-frivolous allegation of contracts with the government . . . . Although the government has raised challenges to these contracts, . . . these challenges go to the ultimate validity of the contracts. The government does not and indeed cannot argue that Liberty's contract claim is so baseless as to constitute a frivolous allegation. Under the law of this circuit, Liberty's complaint suffices to vest the court with jurisdiction. *See Engage Learning*, 660 F.3d at 1352–53. Consequently, the court must deny the government's motion to dismiss . . . for lack of subject matter jurisdiction.

Id. at 587.

Here, appellant's complaint includes non-frivolous allegations of a contract with the Government, which respondent challenges. As case law holds, such challenges go to the ultimate validity of the contract. As appellant's claim is not frivolous, its allegations in its

[4] The Court has recently reiterated this principle in *Avue Technologies Corp. v. Secretary of Health & Human Services*, No. 2022-1784, 2024 WL 949130, at *3 (Fed. Cir. Mar. 6, 2024).

complaint suffice to vest this Board with jurisdiction under the CDA. We therefore deny the motion to dismiss.[5]

Decision

Respondent's motion to dismiss is **DENIED**.

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

I concur:

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

LESTER, Board Judge, concurring.

There is no dispute that the appellant in this case, Gardner Construction & Industrial Services, Inc. (Gardner), entered into a contract with the National Park Service (NPS) in 2018 to replace a fire suppression system, that NPS terminated that contract for default in March 2023, and that Gardner's terminated contract is the subject of the dispute at issue in this appeal. NPS argues, however, that Gardner is no longer in privity with NPS, a defect that NPS argues precludes the Board from exercising jurisdiction over Gardner's challenge to the Government's default termination. NPS alleges that Gardner's founder and original sole shareholder, William Fountain, sold his stock and interest in Gardner to another

[5] The majority's finding is admittedly a narrow one here, i.e., that binding case law requires finding that appellant has presented a non-frivolous allegation of the existence of a contract with respondent, thus requiring the Board to deny respondent's motion to dismiss for lack of jurisdiction. However, this is not to say that Judge Lester's concurring opinion, after allowing for further development of the record, might ultimately prove true on the merits or that his statement that "we are only inviting needless future briefing about Gardner's right to pursue this appeal" might ultimately prove prophetic.

individual, Kurt Toomey, in January 2022. NPS has also discovered that Gardner's phones are no longer operating, that Gardner's website is down, that another business now occupies the address listed on Gardner's corporate filings, and that the mailing address that Gardner provided the Board when filing its appeal is actually the address of another business that Mr. Toomey owns, Westside Enterprises, Inc. (Westside). NPS claims that, "[t]hough still operating under the same [Gardner] company name, Appellant is not the same company with which the Government originally agreed to contract" and that, as a result, "Appellant is not in privity with the Government." Respondent's Motion to Dismiss at 1.

To the extent that NPS is arguing that the Board lacks jurisdiction to entertain this appeal because of a lack of privity between the appellant and the Government, I agree with the panel majority that NPS's allegations do not create a jurisdictional defect in the circumstances here. As the panel majority discusses, the Court of Appeals for the Federal Circuit has held that an appellant need not "prove that it had either an express or implied-in-fact contract with the [agency] to establish the Board's jurisdiction" under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011), but "'need only *allege* . . . the existence of a contract' to which it is a party 'to establish the Board's jurisdiction.'" *Avue Technologies Corp. v. Secretary of Health & Human Services*, No. 2022-1784, 2024 WL 949130, at *3 (Fed. Cir. Mar. 6, 2024) (quoting *Engage Learning*, 660 F.3d at 1353). Gardner has alleged that it was a party to a contract with NPS. That, coupled with the fact that Gardner appealed a contracting officer's final decision terminating Gardner's contract within ninety days after the decision was issued, is sufficient to establish the Board's jurisdiction to entertain Gardner's appeal.

I would go further than does the majority, however, in dealing with the merits of NPS's motion, given that, by failing to do so, we are only inviting needless future briefing about Gardner's right to pursue this appeal. NPS appears to raise two bases for its position that, even though Gardner was indisputably the entity that contracted with NPS, Gardner is somehow no longer in privity with NPS under this contract.

First, NPS argues that, when Gardner's original shareholder, Mr. Fountain, sold his stock to Mr. Toomey, the sale was an assignment that somehow affected Gardner's corporate status and essentially created a different entity than the one with which NPS originally contracted. It argues that, "[w]here the prime contractor that has 'actually contracted with the Government' changes ownership . . . , that entity must demonstrate that the assignment complies with the Assignment of Contracts Act, 41 U.S.C. § 6305, and the Assignment of Claims Act, 31 U.S.C. § 3727 (together, the Anti-Assignment Acts), or their exceptions, in order to establish privity." Respondent's Motion to Dismiss at 8. NPS's assertion is not true.

A shareholder's mere sale of stock, unaccompanied by a reorganization or change in the corporation's business structure and/or merger or consolidation into another business, is not an "assignment" to which the Anti-Assignment Acts apply. Generally, a corporation is viewed as an entity separate and distinct from its shareholders. *Southern California Federal Savings & Loan Ass'n v. United States*, 422 F.3d 1319, 1331 (Fed. Cir. 2005); *In re Cambridge Biotech Corp.*, 186 F.3d 1356, 1376 (Fed. Cir. 1999); *see United States v. State Tax Commission of Mississippi*, 505 F.2d 633, 637 (5th Cir. 1974) ("[A] corporation is a creature of the law and it is a legal personality, separate and apart from that of its owners."). "Once the corporate existence has begun, even though the stockholders, directors and corporate name may change, the corporation retains the same rights, liabilities and responsibilities until dissolved." 6 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 2456 n.6 (2023). When a shareholder sells its stock in a corporation, it is not transferring the corporation's rights or assets to a new buyer. *See* 11 William Meade Fletcher, *supra*, § 5096 ("[T]he property of a corporation does not belong, in law, to the shareholders, but to the corporation as a distinct legal entity or artificial person."). The shareholder is selling and transferring only the shareholder's own interests in the corporation.

Accordingly, if a corporation is a party to a government contract, it does not matter—for purposes of privity with the Government—who holds the stock of the corporation. "In the case of a stock sale, the [corporation] remains the same corporation and only the ownership of that corporation changes. Therefore, any agreements held by that corporation continue to be held by the same corporation, they are not assigned to another corporation." *White v. Hitachi, Inc.*, No. 3:04-CV-20, 2007 WL 2725888, at *5 (E.D. Tenn. Sept. 17, 2007), *aff'd*, 404 F. App'x 502 (Fed. Cir. 2010). As a result, "[a] sale of stock does not result in the violation of a contract [or statutory] provision prohibiting assignment absent express language prohibiting a change of control, because a . . . contract does not transfer from one corporation to another when the stock of the corporation is sold." *Id.*; *see United States Can Co. v. National Labor Relations Board*, 984 F.2d 864, 868 (7th Cir. 1993) ("A sale of stock . . . does not affect the contractual obligations of the corporation."); *Baxter Pharmaceutical Products, Inc. v. ESI Lederle Inc.*, No. CIV-A-16863, 1999 WL 160148, at *5 (Del. Ch. Mar. 11, 1999) (finding that language barring assignment of a contract does not "prohibit[], directly or by implication, a stock acquisition or change of ownership of any contracting party.").

Here, Gardner held a contract with NPS *before* Mr. Fountain sold his stock, and it remained the party holding that contract *after* Mr. Fountain sold his stock. The stock sale did not affect or change *Gardner's* contractual rights or obligations. *See Coca-Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola Co.*, 654 F. Supp. 1419, 1440-41 (D. Del. 1987) ("To make an effective assignment of a contract right, the *owner* of that right"—here, the corporation, not a shareholder of the corporation—"must manifest his intention to make a

present transfer of the right." (emphasis added)), *aff'd*, 988 F.2d 386 (3d Cir. 1993). The Government has no basis for its position that a novation agreement is needed simply because corporate ownership changes. As an entity separate and distinct from its shareholders, the corporation does not change or morph into a new entity simply because a shareholder sells its stock. Were the Government's position correct, large corporations that conduct business with the Federal Government with shares that are publicly traded on a daily basis, such as Boeing Corporation and Lockheed Martin, would have to enter into daily novation agreements with the Government, given that the composition of their shareholders changes on a daily basis. That is unnecessary because the identities and property rights of a corporation's shareholders are separate and distinct from the identity and property rights of the corporation.[6]

Second, NPS appears to argue that, even though Gardner is identified as the appellant in this appeal, the real appellant, or at least the unnamed real party in interest, is either Westside (the other company that Mr. Toomey, the purchaser of Mr. Fountain's stock in Gardner, runs) or Mr. Toomey himself. NPS appears to suggest that, because Gardner is now essentially shuttered and no longer functioning as a viable business, Mr. Toomey must be using Gardner's name as the appellant in this appeal to further his own or Westside's interests. That is, NPS is arguing that Gardner does not really exist anymore and therefore cannot maintain this action in its own name; that Westside or Mr. Toomey is the real party pursuing this appeal; and that neither Westside nor Mr. Toomey can maintain this appeal

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[6] In its response to NPS's motion to dismiss, Gardner argues that Mr. Fountain's sale of his stock to Mr. Toomey does not violate the Anti-Assignment Acts because the stock sale was a transfer "by operation of law" that the Anti-Assignment Acts recognize. Appellant's Opposition to Respondent's Motion to Dismiss at 3. I do not view Mr. Fountain's sale of stock as constituting an assignment of any of the corporation's rights, negating any need for an "operation of law" analysis under the Anti-Assignment Acts. A transfer "by operation of law" occurs through "corporate restructurings, mergers, and name changes 'where in essence the contract continues with the same entity, but in a different form.'" *John Lewinger v. Department of Veterans Affairs*, CBCA 4794, 16-1 BCA ¶ 36,413, at 177,545-46 (quoting *Westinghouse Electric Co. v. United States*, 56 Fed. Cl. 564, 569 (2003), *aff'd*, 97 F. App'x 931 (Fed. Cir. 2004)). Gardner, as a corporation, did not take on "a different form" when Mr. Fountain sold his stock. It remained, and remains, a corporation incorporated under the laws of the Commonwealth of Massachusetts. Because Mr. Fountain's sale did not transfer or change any rights of the corporation, there is no need to engage in an "operation of law" analysis. Only transfers of the *corporation's* rights to a new entity require evaluation of whether the transfer was "by operation of law" for purposes of the Anti-Assignment Acts.

because any assignment of the contract or claim at issue that Gardner may have made to Westside or Mr. Toomey is unenforceable against the Government, meaning that neither Westside nor Mr. Toomey is in privity of contract with NPS.

To the extent that NPS is arguing that either Westside or Mr. Toomey is the real appellant here, neither of them is named in the notice of appeal as the appellant, and neither holds a contract with NPS. To the extent that NPS thinks that Gardner has essentially assigned its right to pursue claims under its contract to either Westside or Mr. Toomey,[7] that voluntary assignment would be invalid and unenforceable. *Holland v. United States*, 62 Fed. Cl. 395, 400 (2004). "But an attempted assignment of a claim against the United States does not forfeit the claim. It leaves the claim where it was before the purported assignment." *Colonial Navigation Co. v. United States*, 181 F. Supp. 237, 247 (Ct. Cl. 1960). Accordingly, to the extent that either Westside or Mr. Toomey is attempting to pursue relief for itself through an assignment from Gardner, the invalidity of that assignment means only that Gardner, the entity actually in privity with NPS, has to pursue the claim, which it is doing.

To the extent that NPS is arguing that Gardner, the corporate entity with whom NPS contracted, cannot maintain this action because it in reality no longer exists, NPS does not allege that Gardner has been administratively dissolved, much less lost its capacity to sue, under the laws of its state of incorporation. As a result, I see no basis for refusing to allow Gardner to maintain this appeal. That being said, the idea that Gardner, if it is truly a shell corporation without assets and is now simply an alter ego of Mr. Toomey, should not be allowed to maintain an action in its name is not completely devoid of precedent. There is some authority suggesting that, where the purchaser of a corporation's stock, even if he does not merge that corporation into his other existing businesses, conducts business in a way that effectively leaves the newly acquired corporation as a shell by depleting or reallocating its assets, denying payment to the corporation's creditors by claiming that the newly acquired corporation has no remaining assets, but then attempting to enforce otherwise non-assignable rights of the corporation, the new owner should "not be allowed to breathe life back into the [effectively defunct corporation]" to enforce those non-assignable rights. *In re Alltech Plastics Inc.*, No. 86-23673-B, 1987 WL 123991, at *10 (Bankr. W.D. Tenn. Dec. 30, 1987). That is, if, after the sale of stock from a controlling shareholder to a new purchaser, the

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[7] Although, technically, Gardner is challenging a government claim in this appeal rather than pursuing its own claim, *Malone v. United States*, 849 F.2d 1441, 1443-44 (Fed. Cir. 1998), the end result of success in this appeal would be to allow the appellant to pursue a claim for termination settlement expenses against NPS. *Darwin Construction Co. v. United States*, 811 F.2d 593, 596-97 (Fed. Cir. 1987).

corporation "has no active existence, no equipment, no employees, and no corporate activity," a tribunal might find that "[t]his attempted innovative rebirth of a corporate shell is not analogous to sale of stock by an active corporation" and instead should be considered like a voluntary sale of corporate assets, *id.* at *8, a type of voluntary transfer that does not allow the purchaser of the assets to avoid the limitations of the Anti-Assignment Acts. *Holland*, 62 Fed. Cl. at 400; *see Westinghouse Electric & Manufacturing Co. v. Radio-Craft Co.*, 291 F. 169, 173-75 (D.N.J. 1923) (stock sale held to violate nontransfer provision of license where original licensee was an abandoned business that was absorbed by the purchaser with the license being the only real asset transferred), *aff'd*, 7 F.2d 432 (3d Cir. 1925).

Nevertheless, in addition to the fact that the Commonwealth of Massachusetts has not rescinded Gardner's capacity to sue, NPS has not alleged that Mr. Toomey has used Gardner's shell status as a basis for declining to honor Gardner's existing debts to its creditors or for some other unjust purpose that affects the Government. To the extent that the kind of "reverse" pseudo-piercing (or shifting) of the corporate veil that NPS seems to be promoting is a viable theory, NPS would have to show more than just that one individual dominates or controls the corporation and treats it as a department, instrumentality, or agent of its other businesses. *Perpetual Real Estate Services, Inc. v. Michaelson Properties, Inc.*, 974 F.2d 545, 548 (4th Cir. 1992); *see* 1 William Meade Fletcher, *supra*, § 41.30 ("Overlapping ownership alone is an insufficient reason to pierce the corporate veil."). Although NPS need not show fraud in the dealings between Gardner and Mr. Toomey's other businesses before piercing the corporate veil, *see McCall Stock Farms, Inc. v. United States*, 14 F.3d 1562, 1568-69 (Fed. Cir. 1993), "it is necessary to show that an injustice would result if the corporate form were left intact." 1 William Meade Fletcher, *supra*, § 41.25. "Massachusetts law," which applies in defining Gardner's corporate status since Massachusetts is the state in which Gardner is incorporated, "is clear that the corporate veil should only rarely be pierced to prevent 'gross inequity.'" *Cambridge Biotech*, 186 F.3d at 1376 (citing *Gurry v. Cumberland Farms, Inc.*, 550 N.E.2d 127, 133 (Mass. 1990)).

Here, Gardner is challenging NPS's termination of its contract for default. NPS does not explain why it would be "grossly inequitable" to allow Gardner to mount that challenge. Although NPS asserts that, were the default termination overturned, Gardner would not be able to perform the contract given its current status, continued performance of the contract would not be the remedy even if the default termination were overturned. *See John Reiner & Co. v. United States*, 325 F.2d 438, 442-45 (Ct. Cl. 1963) (remedy for an improper default termination is to convert it into one for the convenience of the Government). Accordingly, the fact that Gardner is winding down its operations and effectively preparing to shut itself down is no reason to preclude Gardner from challenging what it believes was an improper termination for default and, if successful, to submit a termination settlement proposal seeking

compensation for the termination. If Gardner has unpaid creditors who will not receive payment absent Gardner's successful pursuit of this appeal, the only gross inequity would be to preclude Gardner from maintaining its appeal.

For the foregoing reasons, I believe that NPS has failed to allege facts that put into question Gardner's ability to pursue this appeal and has identified no basis for dismissing the appeal. I concur in the panel majority's denial of the Government's motion to dismiss.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge