



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION TO DISMISS GRANTED: September 25, 2019

CBCA 6303

LEIDOS INNOVATIONS CORPORATION,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Shelly L. Ewald of Watt, Tieder, Hoffar & Fitzgerald, LLP, McLean, VA, counsel for Appellant.

Tyler J. Mullen and Sarah E. Park, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Judges **SOMERS** (Chair), **HYATT**, and **LESTER**.

SOMERS, Board Judge.

Pending before the Board is the motion of the General Services Administration (GSA or Government) to dismiss for lack of jurisdiction or for failure to state a claim. GSA contends that Leidos Innovations Corporation (Leidos) has no standing to appeal because it is not in privity of contract with the Government. GSA contends that Lockheed Martin Integrated Systems, Inc. (Lockheed), as the actual recipient of the GSA contracting officer's final decision, did not timely file an appeal.

Also pending is Leidos' motion to dismiss for lack of jurisdiction or for failure to state a claim. Leidos asserts that GSA failed to issue a contracting officer's final decision to

Leidos, the entity currently under contract with GSA. Alternatively, appellant contends that GSA's complaint must be dismissed for failure to state a claim upon which relief can be granted.

We find that, as a result of a novation agreement, Leidos is the contractor in privity with GSA. As a consequence, the GSA contracting officer's final decision, issued to Lockheed, is ineffective because the final decision was not issued to the proper contractor. Accordingly, we grant Leidos' motion to dismiss for lack of jurisdiction. Our decision renders all other pending motions moot.

Background

This dispute arises out of a Federal Supply Schedule (FSS) contract awarded by GSA to Lockheed on December 1, 2002. On August 29, 2013, the GSA Office of Inspector General (OIG) concluded, through an audit, that some of Lockheed's employees did not meet the labor qualification requirements for the positions which Lockheed billed under the GSA contract.

On April 4, 2014, Lockheed requested that the contract be cancelled. GSA cancelled the contract on May 10, 2014.

On July 28, 2016, GSA sent Lockheed a summary of findings following a post-award audit on the original contract. Leidos responded to GSA's findings on September 30, 2016. Leidos responded instead of Lockheed because on August 16, 2016, Lockheed had divested itself of the business unit responsible for the GSA contract, which became a wholly-owned subsidiary of Leidos Holdings, Inc., known as Leidos Innovations Corporation. Effective that same day, Lockheed and Leidos executed a novation agreement that was signed by Lockheed's Corporate Administrative Contracting Officer (CACO), who was an employee of the Defense Contract Management Agency (DCMA), and representatives of the two contractors. In the novation agreement, the parties expressly indicated that the agreement covered contracts that had been completely performed at the time of the novation, including the contract issued by GSA to Lockheed on December 1, 2002. The agreement stated, in pertinent part:

(a) The parties agree to the following facts:

(1) The Government, represented by various Contracting Officers, has entered into certain contracts with the Transferor, as shown in the attached list marked "Exhibit A" *and incorporated in this Agreement by reference*. The term "the

Contract,” as used in this Agreement, means the above contracts and purchase orders, and any task orders or delivery orders associated with the contracts identified in Exhibit A (whether or not those orders are listed), including all modifications, made between the Government and the Transferor before the effective date of this Agreement (whether or not performance and payment have been completed and releases executed if the Government or the Transferor has any remaining rights, duties, or obligations under these contracts and orders).

* * *

(b) In connection of these facts, the parties agree that by this Agreement—

(1) The Transferor confirms the transfer to the Transferee, and waives any claims and rights against the Government that it now has or may have in the future in connection with the Contracts.

(2) The Transferee agrees to be bound by and to perform each Contract in accordance with the conditions contained in the Contracts. The Transferee also assumes all obligations and liabilities of, and all claims against, the Transferor under the Contracts as if the Transferee were the original party to the Contracts.

* * *

(4) The Government recognizes the Transferee as the Transferor’s successor in interest in and to the Contracts. The Transferee by this Agreement becomes entitled to all rights, titles, and interests of the Transferor in and to the Contracts as if the Transferee were the original party to the Contracts. Following the effective date of this Agreement, the term “Contractor,” as used in the Contracts, shall refer to the Transferee.

As noted above, the novation agreement provided that Leidos assumed all liabilities of and claims against Lockheed under the contracts and that the Government now recognized Leidos as the contractor and successor in interest to Lockheed under them.

On December 29, 2016, GSA's OIG issued a post-award report concerning a blanket purchase agreement that Lockheed had performed under the contract. GSA provided this report to Lockheed, and not to Leidos, on March 14, 2018.¹ Despite the fact that the contract at issue was listed among those to be transferred to Leidos, GSA contends that, in its response to the report, a Lockheed attorney stated that it had not novated to Leidos contracts for which it had already completed all work, including the contract that was the subject of the audit, and that responsibility for such contracts remained with Lockheed.² Ultimately, GSA issued a contracting officer's final decision on July 31, 2018, to Lockheed, seeking \$12,415,797.03 for overbilling.

On October 30, 2018, in an abundance of caution, Leidos filed a notice of appeal of that decision to the Board in its own name, even though the decision had been issued to Lockheed, and indicated that, in the alternative, it was filing the appeal on behalf of Lockheed³. We docketed that appeal as CBCA 6303.

Subsequently, both GSA and Leidos filed motions to dismiss for lack of jurisdiction.

Discussion

Assignment of Contracts

Pursuant to the Assignment of Contracts Act, 41 U.S.C. § 6305(a) (2012), which is often referred to (along with the Assignment of Claims Act, 31 U.S.C. § 3727), as one of the "Anti-Assignment Acts," 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." "Despite the bar created by [the Act], . . . the Government may recognize an assignment as valid, either directly or constructively, through its actions." *Summit Commerce*

¹ The record fails to explain the two-year (plus) delay in the provision of this report to Lockheed.

² During oral argument, appellant's counsel acknowledged that a Vice President and Associate General Counsel for Lockheed initially mistakenly believed that the contracts that had been concluded had not been subject to the novation. However, a colleague later informed him that his understanding was incorrect. This contract had been included on the list of contracts governed by the novation agreement. The record is silent as to whether the attorney relayed this fact to GSA.

³ In this decision, we amend the caption to properly reflect that Leidos alone is the appellant.

Pointe, LLC v. General Services Administration, CBCA 2652, et al., 13 BCA ¶ 35,370, at 173,569. A novation agreement is the most direct form of such recognition. *Id.* “Through a novation agreement, the government legally recognizes a successor-in-interest to a government contract (or a list of contracts) following a transfer of that contract that would otherwise be prohibited by the Anti-Assignment Act.” *Raytheon Co. v. United States*, 105 Fed. Cl. 236, 254 (2012), *aff’d*, 747 F.3d 1341 (Fed. Cir. 2014).

The Federal Acquisition Regulation (FAR) details the requirements for these novation agreements. It provides that the Government, “when in its interest,” may enter into a novation agreement and “recognize a third party as the successor in interest to a Government contract.” 48 CFR 42.1204(a). Under the FAR, a novation agreement generally provides that:

- (1) The transferee assumes all the transferor’s obligations under the contract;
- (2) The transferor waives all rights under the contract against the Government;
- (3) The transferor guarantees performance of the contract by the transferee (a satisfactory performance bond may be accepted instead of the guarantee); and
- (4) Nothing in the agreement shall relieve the transferor or transferee from compliance with any Federal law.

48 CFR 42.1204(h).

Novation Agreement Validity

GSA asserts that Leidos lacks standing to bring this appeal before the Board because Leidos does not stand in privity of contract with GSA. This argument rests upon the validity of the novation agreement executed between Lockheed, Leidos, and DCMA’s CACO on August 30, 2018.

GSA first claims that the novation agreement cannot apply to the GSA contract at issue here because performance under the contract was already complete, and the contract cancelled, by the time that the novation agreement was executed. To analyze this argument, we first examine the elements required for a valid novation, specifically, (1) . . . a previous valid obligation; (2) the agreement of all parties to the new contract; (3) the extinguishment of the old contract; and (4) the validity of the new one.” 30 Richard A. Lord, *Williston on Contracts* § 76:11 (4th ed. 2004). The United States Court of Appeals for the Federal Circuit, when examining this issue, has held that the consent of all parties is the essential feature of a valid novation of a government contract. *Agility Logistics Services Co. KSC v. Mattis*, 887 F.3d 1143, 1151 (Fed. Cir. 2018). “[A] successor in interest under a novation agreement, pursuant to which it is ‘entitled to all the rights’ of its predecessor as if it were ‘the original

party' to the contract, is recognized by the government as the successor in interest for all purposes, including the right to pursue any claims its predecessor could have pursued.” *Cooper/Ports America, LLC*, ASBCA 61461,18-1 BCA ¶ 37,045, at 180,331 (citing *Vought Aircraft Co.*, ASBCA 47357, 95-1 BCA ¶ 27,421, at 136,666). Similarly, where, as here, the transferee (Leidos) has expressly assumed all liabilities of and claims against the transferor (Lockheed), and where the Government has accepted that substitution, there is no reason not to recognize that substitution when the Government subsequently identifies and asserts a government claim arising under a contract covered by the novation agreement.

We have found no binding precedent or persuasive authority that supports GSA’s argument that a previous valid obligation (one of the requirements for a novation) cannot include a contract that had been performed but was subsequently cancelled. At some point following the contract’s execution and before cancellation, Lockheed had been under an obligation to perform. This obligation included participating in the audit process and permitted the Government to assert claims resulting from this process. Further, it is clear, in light of GSA’s post-contract assertion of a government claim against Lockheed under the contract at issue, that GSA believes that it retains a right to seek a refund of monies under the novated contract. The language of the novation agreement expressly indicates that the Government agrees to a transfer in the identity of the contractor for any contracts “whether or not performance and payment have been completed and releases executed if the Government or the Transferor has any remaining rights, duties, or obligations under these contracts and orders.” The novation agreement itself is a contract, and we see no reason that the Government is not bound to the plain language of its contract that identifies the GSA contract at issue here as subject to the novation. In light of the novation agreement, Leidos, not Lockheed, has standing to defend (or prosecute) against any claims arising from the contract.

GSA, quoting from a March 2018 letter from the GSA contracting officer to Lockheed, next argues that, because a DCMA contracting officer and not a GSA contracting officer executed the novation agreement, “GSA has not legally recognized any successor in interest or liability for the subject contract.” Although GSA does not expressly state that it is challenging the authority of the DCMA CACO to bind GSA, it argues that the CACO who was assigned responsibility for dealing with Lockheed and who executed the novation agreement upon behalf of the Government “was from another federal agency, wholly separate from GSA,” and that only a “GSA Administrative Contracting Officer” could bind

GSA to the novation.⁴ GSA's argument reflects a lack of understanding of the regulatory procedures that can apply to large contractors with numerous locations and contracts.

“Contractors with more than one operational location . . . often have corporate-wide policies, procedures, and activities requiring Government review and approval and affecting the work of more than one administrative contracting officer (ACO).” FAR 42.601. “[E]ffective and consistent contract administration may require the assignment of a [CACO] to deal with corporate management and to perform selected contract administration functions on a corporate-wide basis” in such circumstances. *Id.* We must assume, given the absence of any contrary evidence and even allegations in the record, that, since the Government assigned a CACO to work with Lockheed, the regulatory prerequisites for placing such a government-wide representative were satisfied before the CACO began her duties. *See* FAR 42.602 (discussing placement of CACOs). Under the FAR, when a contractor to which a CACO has been assigned has contracts with more than one agency, the agencies involved “agree on the responsible agency” before the CACO is placed, “normally on the basis of the agency with the largest dollar balance, including options, of affected contracts.” FAR 42.602(c)(2). Once the CACO begins work, he or she exercises contract administration functions “on a corporate-wide basis” that can cover all of the contractor’s contracts. *Id.* 42.603(a). Although GSA complains that no GSA contracting officer had any involvement in approving the novation at issue here, GSA has not even alleged, much less presented evidence, that the CACO was not acting within the regulatory scheme applicable to CACOs set forth in FAR Section 42.6.

Moreover, GSA’s argument ignores the impact of the novation agreement, as defined by the FAR, to which the CACO agreed upon behalf of the Government. Under its definition section, the FAR defines a novation agreement as a legal agreement that is:

- (1) executed by the—
 - (I) Contractor (transferor);
 - (ii) Successor in interest (transferee); and
 - (iii) Government; and
- (2) By which, among other things, the transferor guarantees performance of the contract, the transferee assumes all obligations under the contract, and the Government recognizes the transfer of the contract and related assets.

48 CFR 2.101.

⁴ In oral argument, counsel for the government conceded that the CACO had authority to bind the government.

Under this definition of a novation, the novation agreement must be executed by the contractor, the successor in interest, and the Government—not each individual agency affected by the novation. If the FAR intended to require consent of each individual agency, the definition would have included these additional details. However, as the definition is written, it calls for the Federal Government as a whole to be a party, and the CACO, pursuant to FAR Section 42.6, was authorized to represent the Government as a whole in this matter.

The CACO signed the novation agreement in his/her capacity as a representative of the Federal Government—satisfying the necessary element of the Government’s consent. Lockheed—the Contractor, Leidos—the successor in interest, and the CACO—the Government—all consented to the novation agreement in question and thus, satisfied the three essential parties required under the FAR. Therefore, GSA’s failure to recognize Leidos as the successor in interest does not affect the execution of the novation. We find that the novation agreement satisfied the essential contract law elements of a novation in addition to the FAR’s definition.

FAR and GSA FSS Novation Procedure

GSA asserts that Lockheed violated the FAR and its GSA FSS contract by providing incorrect contact information for the contract in question. GSA argues that because Lockheed did not provide the correct contracting office information, GSA was not contacted before the CACO signed the novation agreement. GSA asserts that by providing incorrect contact information, Lockheed violated its duty under the FAR. We find that, regardless of the information’s accuracy, GSA’s argument incorrectly places the burden on the contractor to contact and provide notice to all government agencies affected by a novation agreement.

FAR subpart 42.12 discusses the proper procedure when executing novation agreements in which the Government is a party. FAR 42.1203(b) places an obligation on the contracting officer to (1) identify and request the information from the contractor that the contracting officer deems necessary to evaluate the proposed agreement, (2) notify each of the contract administration and contracting officers that the agreement would affect, and (3) request submission of any comments or objections to the proposed agreement within thirty days of notification. These provisions indicate that the relevant contracting officer must contact all offices affected by the novation. The FAR does not require the contractor to contact any specific contracting officer other than the contracting officer expressly involved in the contract administration process.

Here, GSA failed to identify, within the FAR or the GSA FSS, any regulation that places the burden upon the contractor to inform any person other than those involved in its specific contract. Rather, it is up to the corporate administrative contracting officer to ensure

that the Government's counsel has reviewed the proposed agreement for legal sufficiency. FAR 42.1203(f). The Government failed to identify any errors in the information provided, leaving Lockheed unaware that incorrect information may have been provided. Under the FAR, the Government is required to notify the relevant contract administration office. The failure to do so, and the consequences thereof, rests on the Government.

Lastly, GSA argues that Lockheed's failure to provide accurate information when submitting its novation proposal violates the GSA FSS contract clause FAR 52.212-4(t). Again, the accuracy of the information provided is irrelevant in this matter. This contract clause requires the contractor to insure the information found in the Central Contractor Registration system is accurate during performance through final payment of the contract. In this case, the information in question was provided after the contract had been cancelled, and thus, the clause does not apply to the issue at hand. Therefore, Lockheed did not violate the FAR or GSA FSS when providing information for the novation agreement.

Decision

For these reasons, we **GRANT** Leidos' motion to dismiss for lack of jurisdiction. We find that, pursuant to a valid novation agreement, Leidos assumed all rights and obligations as the contractor to this contract at issue in this appeal, effective August 16, 2016. Because the Government failed to issue a contracting officer's final decision to Leidos, we do not possess jurisdiction over this appeal. The issuance of the contracting officer's final decision to Lockheed is a nullity because Lockheed was no longer the contractor of record.

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

We concur:

Catherine B. Hyatt
CATHERINE B. HYATT
Board Judge

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