



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED: June 27, 2022

CBCA 7163

ATS TRANS LLC dba AROUND THE SOUND/TRANSPRO,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Howard W. Roth, III, and Jedidiah K. Blake of Oles Morrison Rinker & Baker, LLP, Seattle, WA, counsel for Appellant.

David G. Fagan, Office of General Counsel, Department of Veterans Affairs, Portland, OR, counsel for Respondent.

Before Board Judges **LESTER**, **VERGILIO**, and **ZISCHKAU**.

Opinion for the Board by Board Judge **ZISCHKAU**. Board Judge **VERGILIO** concurs.

ZISCHKAU, Board Judge.

The Department of Veterans Affairs (VA) has moved to dismiss this appeal on the grounds that the Board lacks jurisdiction. The VA argues that the Assignment of Contracts Act, 41 U.S.C. § 6305 (2018), also known as one of the Anti-Assignment Acts, invalidates the transfer of the contract to Around the Sound (ATS) Trans LLC, such that ATS lacks the privity of contract necessary to bring this claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109. ATS replaced TransPro as the contractor as a result of a corporate merger, and because the “operation of law” exemption to the Anti-Assignment Act is

applicable here, we have jurisdiction over ATS's appeal. Accordingly, we deny the VA's motion.

Background

On July 16, 2014, the VA contracted with TransPro, Inc. (TransPro) to provide transportation services for disabled veterans. The contract as modified ran from August 2014 through March 2020.

On or about December 17, 2015, TransPro and ATS executed a merger agreement effective January 1, 2016, by which ATS assumed all of TransPro's liabilities. Respondent's Motion to Dismiss, Exhibit A at 3. ATS and TransPro were incorporated in Washington state. In accordance with the merger, ATS was the surviving organization, and TransPro ceased to exist as a separate legal entity, but ATS continued to do business as TransPro. Washington state law provides: "[w]hen a merger becomes effective: . . . [t]he surviving organization has all liabilities of each constituent organization Except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of each constituent organization that ceases to exist vest in the surviving organization." Wash. Rev. Code Ann. § 25.15.431(1)(d), (f) (2015). It is uncontested that the contractor personnel, management, and resources dedicated to the contract remained the same after the merger.

Prior to the merger, ATS informed the contracting agency that ATS planned on merging the companies. After the merger, ATS advised the agency that the actual name of the company is ATS Trans LLC dba Around the Sound/TransPro. Every invoice that ATS submitted to the VA after the merger was submitted in the name of "ATS Trans LLC dba Around the Sound/TransPro." The VA paid these invoices. The VA notes that all of the contract modifications after the time of the merger still named TransPro as the contractor.

On January 8, 2021, ATS submitted a claim to the contracting officer that the VA constructively changed the contract by failing to pay for services that had been invoiced. On April 14, 2021, the contracting officer issued a final decision denying ATS' claim on the ground that ATS did not perform any work beyond that required by the contract. ATS appealed the decision to the Board.

The VA filed a motion to dismiss the appeal for lack of jurisdiction, claiming that ATS lacked privity of contract with the Government necessary to bring its appeal under the CDA. The VA argues that the assignment of the contract from TransPro to ATS was invalid under the Anti-Assignment Act. ATS opposes the VA's motion to dismiss, arguing that the 2016 ATS-TransPro merger makes the assignment of the contract to ATS valid under the "operation of law" exemption to the Anti-Assignment Act. The VA responds that the "operation of law" exemption does not apply in this case because ATS misrepresented itself

as TransPro to the VA after TransPro ceased to exist. The VA claims that this misrepresentation prejudiced the VA's ability to render an evaluation in the Contractor Performance Assessment Reporting System (CPARS) of the correct entity.

Discussion

The CDA provides that a contractor may appeal a contracting officer's decision. 41 U.S.C. § 7104. The CDA defines "contractor" as "a party to a Federal Government contract other than the Federal Government." *Id.* § 7101(7). The VA argues that ATS does not meet the CDA definition of contractor because the assignment of the TransPro contract to ATS was invalid under the Anti-Assignment Act. The question we are asked to resolve, therefore, is whether TransPro's contract was assigned to ATS by operation of law as a result of the ATS-TransPro merger. Although the VA recognizes the operation of law exemption to the Anti-Assignment Act, it argues that ATS misrepresented or failed to disclose the existence of the merger in a timely manner, which should preclude the assignment by operation of law.

The Assignment of Contracts Act, 41 U.S.C. § 6305, and the Assignment of Claims Act, 31 U.S.C. § 3727, together make up the "Anti-Assignment Acts." *See Mayberry Enterprises, LLC v. Department of Energy*, CBCA 5961, et al., 20-1 BCA ¶ 37,616. These Acts generally prohibit the assignment of a government contract or claim. *Johnson Controls World Services, Inc. v. United States*, 44 Fed. Cl. 334, 342 (1999). The Acts serve two primary purposes – "first, to prevent persons of influence from buying up claims against the United States, which might then be improperly urged upon officers of the Government; and second, to enable the United States to deal exclusively with the original claimant instead of several parties." *Id.* at 343 (quoting *Monchamp Corp. v. United States*, 19 Cl. Ct. 797, 801 (1990)). Any attempt to transfer a contract in violation of the Assignment of Contracts Act annuls the contract. *Id.* at 342. A valid transfer subject to that statute requires government approval to be binding against the Government. *See Westinghouse Electric Co. v. United States*, 56 Fed. Cl. 564, 570 (2003), *aff'd*, 97 F. App'x 931 (Fed. Cir. 2004). The Government can recognize an assignment expressly via novation or implicitly by ratification or waiver. *United International Investigative Services v. United States*, 26 Cl. Ct. 892, 898 (1992).

Assignments occurring by the "operation of law" (i.e., corporate restructurings, mergers, and name changes "where in essence the contract continues with the same entity, but in a different form") are exempt from the Act's application. *Westinghouse Electric Co.*, 56 Fed. Cl. at 569; *Lewinger v. Department of Veterans Affairs*, CBCA 4794, 16-1 BCA ¶ 36,413. This exception has been recognized since the Supreme Court's decision in *Erwin v. United States*, 97 U.S. 392 (1878) (cited in *American Government Properties v. United States*, 118 Fed. Cl. 61, 66 (2014)). Courts have applied the exception to statutory mergers,

concluding that such assignments do not present the danger that the statute was designed to obviate. See *Seaboard Air Line Railway v. United States*, 256 U.S. 655, 657 (1921); *Tuftco Corp. v. United States*, 614 F.2d 740, 744-45 (Ct. Cl. 1980).

The VA argues that the “operation of law” exemption to the Anti-Assignment Act should not apply to the merger between TransPro and ATS because, according to the VA, ATS misrepresented itself to the VA as TransPro after TransPro ceased to exist, and the VA claims that this misrepresentation prejudiced the VA. As the *United International Investigative Services* court recognized, where the “purposes [of the Act] are not impinged, a transfer should be allowed to stand. Thus, a transfer should be upheld when the government recognizes it either expressly as by novation or implicitly as by ratification or waiver. *In addition, transfers occurring by operation of law are exempt from the statute’s application.*” 26 Cl. Ct. at 898 (emphasis added). Courts have repeatedly held that mergers fall outside the purpose of the statute. See, e.g., *Tuftco*, 614 F.2d at 744-45; *NGC Investment & Development Co. v. United States*, 33 Fed. Cl. 459, 463 n.7 (1995). There was a valid merger between ATS and TransPro, such that by operation of law, TransPro’s contract was assigned to ATS. Given this valid assignment, ATS is a contractor under the CDA. Even if, as the VA apparently believes, ATS misrepresented itself as TransPro by not sufficiently clarifying to the VA after the merger that ATS was now the successor-in-interest contractor but was continuing to do business using the TransPro name, it would not change the fact that the ATS-TransPro merger established an entity that, by operation of law, was entitled to perform TransPro’s contract.

Decision

Respondent’s motion to dismiss for lack of jurisdiction is **DENIED**.

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

I concur:

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

VERGILIO, Board Judge, concurring.

The agency (Department of Veterans Affairs) moves to dismiss for lack of jurisdiction, relying upon the Anti-Assignment Act, 41 U.S.C. § 6305 (2018). It alleges that the appellant (ATS Trans LLC) lacks standing because it is not in privity of contract with the agency. In response, the appellant has demonstrated that it operates as a matter of law in its own name, as well as in its own name doing business as the original contractor with the agency. The agency does not mention or attempt to distinguish precedent, *Lewinger v. Department of Veterans Affairs*, CBCA 4794, 16-1 BCA ¶ 36,413, which dictates that the appellant is a proper party and that the Board has jurisdiction. The arguments and allegations by the agency are unavailing in light of *Lewinger* and applicable Washington state law (the state of incorporation of appellant which controls the effects of the merger, Wash. Rev. Code Ann. § 25.15.431(1)(d), (f) (2015)). I do not feel compelled to say more than this and would spare the reader unneeded background and history.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge