UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR EMERGENCY RELIEF DENIED:
October 7, 2021

CBCA 7195, 7211

HEROES HIRE LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Jessica House, Chief Executive Officer of Heroes Hire LLC, Loganville, GA, appearing for Appellant.

Kathleen Ellis-Ramos, Office of General Counsel, Department of Veterans Affairs, Arlington, TX, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **LESTER**, and **KULLBERG**.

LESTER, Board Judge.

In these recently-filed appeals, Heroes Hire LLC (Heroes Hire) challenges a decision by a Department of Veterans Affairs (VA) contracting officer terminating its contract for cause. One of Heroes Hire's defenses to the termination involves a dispute over the validity of an assignment of its contract payments to its lender under an exception to the Assignment of Claims Act, 31 U.S.C. § 3727 (2018). On September 30, 2021, Heroes Hire filed a motion for emergency relief, seeking "immediate, emergency relief from the Assignment of Claims for contract 36C25221C0064" previously granted to its assignee, Factors Southwest, L.L.C. (FSW). Heroes Hire asks that we void the assignment of payments to FSW and direct the VA contracting officer "to submit Heroes Hire invoices . . . for immediate payment,

removing all Assignee (FSW Funding) authority to receive contractual payments on behalf of Heroes Hire, thereby returning all rights, authority and payments back to Heroes Hire as Contractor immediately." Because we lack authority to grant the relief that Heroes Hire requests, we must deny its motion for emergency relief. Nevertheless, in accordance with Heroes Hire's request that we address merits issues in an expedited manner to assist in minimizing costs, we address and reject Heroes Hire's assignment invalidity defense to the VA's decision terminating Heroes Hire's contract for cause.

Background

On August 23, 2021, the Board docketed CBCA 7195, which is Heroes Hire's first appeal of a VA contracting officer's decision dated August 19, 2021, terminating for cause a contract through which Heroes Hire provided community care nurse services at a particular VA hospital. In its appeal notice, Heroes Hire indicated that there was an amount in dispute of $21,030, but Heroes Hire has not submitted a claim to the VA contracting officer seeking payment of money in a sum certain. Nevertheless, in her termination decision, the contracting officer indicated that Heroes Hire was still owed $3577.50 for services rendered under the contract but not invoiced and that the VA would pay that amount, minus any discounts, upon receipt of an invoice. In a subsequent status conference, counsel for the VA indicated that, upon further review, the VA now believes that the amount that Heroes Hire is still owed but for which it has still not invoiced is just above $20,000.

On September 14, 2021, the Board docketed CBCA 7211, which is a second appeal by Heroes Hire arising out of the same August 19, 2021, termination decision. Heroes Hire explained in a subsequent status conference that, because its appeal notice in CBCA 7195 only mentioned its request for payment of $21,030, it had filed the second appeal out of an abundance of caution to ensure that the Board was aware that, in addition to seeking money, Heroes Hire was challenging the VA's termination of its contract for cause and wanted the termination converted to a convenience termination. Although recognizing that the second appeal might be unnecessary, the Board elected to consolidate the two appeals and to address the necessity of the second appeal at a later date.

In the termination decision underlying both of these appeals, the VA contracting officer asserted that termination was justified because Heroes Hire had stopped providing nurses at the hospital, in violation of its contractual obligations, and had failed to provide adequate assurances of future performance. According to the contracting officer, Heroes Hire began providing nursing services under the contract on April 21, 2021, and was supposed to have continued until September 30, 2021. On or about July 20, 2021, however, the Heroes Hire nurse who was then providing on-site hospital services informed the VA that Heroes Hire had instructed her not to return the next day or thereafter until "invoicing issues" were resolved.

Those "invoicing issues" involve an assignment that Heroes Hire had previously provided to the VA contracting officer directing that all payments for Heroes Hire's contract work be made to FSW, which lent money to Heroes Hire. Heroes Hire originally provided that assignment to the VA contracting officer in May 2021, and the VA contracting officer initially questioned Heroes Hire about whether it wanted or needed an assignment on a contract with such a short performance period. It appears, though, that the contracting officer, after communicating with legal counsel and FSW, determined that she had to accept and implement the contract payment assignment. Heroes Hire and the VA executed a bilateral modification effective June 25, 2021, by which the VA formally recognized Heroes Hire's assignment of its contract payments.

Heroes Hire later sought to annul the assignment, providing the VA contracting officer with what it purported to be a release of the assignment. That release, however, was signed only by Heroes Hire, not by FSW. When the VA contracting officer contacted FSW for its signature on the release, FSW informed the VA contracting officer, apparently without Heroes Hire's knowledge, that Heroes Hire's debt to it was not satisfied and that FSW would not sign any release of the assignment until it was.

The VA contracting officer then notified Heroes Hire that, until FSW signed a release of the assignment, she could not pay contract monies directly to Heroes Hire and would have to continue to send any contract payments to FSW. Heroes Hire insisted that it had fully satisfied its debt to FSW, that FSW's signature on a release was unnecessary to rescind the assignment, that the VA contracting officer should recognize and effectuate the release signed by Heroes Hire, and that the VA should pay due and owing contract amounts directly to Heroes Hire. Until such payments were forthcoming, Heroes Hire reported, it could not continue to send nurses to the hospital pursuant to the terms of the contract. The VA contracting officer contacted FSW to ask whether it would sign the release, but FSW's responses on August 3 and 9, 2021, were that it "can't sign the release at this time," that the assignment "is still effective," and that "FSW will not release the assignment until the Heroes Hire obligation to FSW is paid in full." After Heroes Hire declined to provide nurse staffing services unless it received direct contract payments, the VA contracting officer on August 19, 2021, terminated Heroes Hire's contract for cause.

After Heroes Hire appealed the termination decision to the Board, we directed the VA to file the complaint and to outline the basis of the termination for cause, as well as to submit an appeal file in accordance with the requirements of Board Rule 4 (48 CFR 6101.4 (2020)). Soon after the VA submitted the complaint and its Rule 4 file, Heroes Hire filed its motion for emergency relief, asserting that the documents in the appeal file showed that the original assignment notice was defective, that the VA therefore should never have acknowledged the assignment, that the VA contracting officer's contacts with FSW after receiving the defective assignment notice and subsequent decision to recognize the assignment despite those defects

were inappropriate and in bad faith, and that Heroes Hire is entitled essentially to void the assignment and receive future contract payments itself, without regard to the assignment.

At Heroes Hire's request, the Board conducted a status conference with the parties on October 1, 2021, to discuss Heroes Hire's concerns and the basis of its challenge to the assignment that it previously made to FSW. During the conference, Heroes Hire indicated that it is currently in arbitration with FSW, attempting to resolve disputes about Heroes Hire's debt or lack thereof, and acknowledged that FSW has, to date, refused to sign a release of the assignment of payments. FSW has not rescinded prior representations to the VA contracting officer that Heroes Hire still owes it money and that it will not sign a release until all debts are satisfied. Although the VA contracting officer indicated in the termination decision that, upon receipt of an invoice, the VA would pay Heroes Hire for work performed but not yet paid, Heroes Hire is reluctant to submit the invoices since any payment on future invoices would be directed to FSW rather than Heroes Hire.

Discussion

Heroes Hire's Requests for Injunctive and Affirmative Monetary Relief

Heroes Hire is asking that we direct the VA to forward invoices (that Heroes Hire apparently has not yet submitted) to the VA's disbursement office and to pay the amounts on those invoices directly to Heroes Hire rather than to FSW. We lack that type of injunctive power. Our authority to adjudicate contract disputes arises under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109, a statute that allows us (assuming that jurisdictional prerequisites such as the submission of a claim are satisfied) to consider requests for contractual money damages and, in certain instances, to declare the parties' respective rights and obligations under their contract. *CompuCraft, Inc. v. General Services Administration*, CBCA 5516, 17-1 BCA ¶ 36,662. The CDA does not allow us to grant injunctive relief. *BVB Construction, Inc. v. Department of Veterans Affairs*, CBCA 6318, 19-1 BCA ¶ 37,253; *Ulric McMillan*, GSBCA 7029-COM, et al., 83-2 BCA ¶ 16,595.

Even if we had such authority, we could not direct payment here because Heroes Hire has not submitted a monetary claim in a sum certain to the VA contracting officer demanding direct payment. Typically, "[f]or the Board to possess jurisdiction to entertain an appeal for monetary relief, the contractor must first have submitted a claim to the contracting officer identifying the basis of the [money] request, seeking payment of a sum certain, and requesting, either expressly or implicitly, a decision of the contracting officer." *Foxy Construction, LLC v. Department of Agriculture*, CBCA 5632, 17-1 BCA ¶ 36,687 (quoting *Bon Secour Management, LLC v. Department of Veterans Affairs*, CBCA 4703, 17-1 BCA ¶ 36,888 (2015)). "The mere fact that the Board possesses jurisdiction to 'consider [a contractor's] timely-filed challenge to [a] default termination,'" as we do here, "does not

somehow permit us to entertain associated monetary claims that the contractor never submitted to the contracting officer for decision." *Mayberry Enterprises, LLC v. Department of Energy*, CBCA 5961, 18-1 BCA ¶ 36,998 (quoting *Primestar Construction v. Department of Homeland Security*, CBCA 5510, 17-1 BCA ¶ 36,612 (2016)). That the VA contracting officer, in her termination decision, mentioned Heroes Hire's entitlement to monies for work performed, assuming it submits an invoice, does not change that result. Without addressing whether the contracting officer's inclusion of a statement in a termination decision about money due the contractor could ever eliminate the contractor's need to submit an affirmative monetary claim, the monetary portion of the VA contracting officer's termination decision here does not discuss voiding the assignment to FSW and making contract payments directly to Heroes Hire. Absent a claim from Heroes Hire identifying that specific basis for a directed-payment monetary demand, we lack a jurisdictional basis to entertain Heroes Hire's monetary payment request.

Assignment Invalidity As A Defense To The Termination Decision

Although we cannot entertain Heroes Hire's request that we order the VA to pay invoices directly to it, its complaints about the VA's acceptance and administration of the assignment to FSW are at the heart of its defense to the VA's termination of its contract for cause. It argues that the VA should not have accepted the assignment because it was defective and that, in any event, the VA should have released the assignment after Heroes Hire delivered a notice of release that Heroes Hire – but not FSW – had signed. Because the VA, by late June 2021, was sending contract payments to FSW, Heroes Hire was no longer receiving funds with which to pay its nurses, and it stopped performing its contract because of the absence of funding. The cessation of performance formed the basis of the VA's contract termination decision. In response to Heroes Hire's desire to expedite these appeals, and in accordance with the guidance of Board Rule 1(a) encouraging the "informal, expeditious, and inexpensive" development and resolution of appeals, we address below Heroes Hire's complaints about the assignment process as they relate to Heroes Hire's defense to the VA's termination for cause.

The Assignment of Claims Act, 31 U.S.C. § 3727, and the Assignment of Contracts Act, 41 U.S.C. § 6305 (collectively, the Anti-Assignment Acts), memorialize the "general rule that forbids the assignment of claims [and of contracts] against the government." *Applied Cos. v. United States*, 144 F.3d 1470, 1476 (Fed. Cir. 1998). Nevertheless, the Anti-Assignment Acts contain an exception requiring the Government to recognize assignments of Government contract proceeds to certain types of lending institutions. 31 U.S.C. § 3727(b); 41 U.S.C. § 6305(c)(1). The purpose of that exception is to "make it easier for government contractors to secure financing for carrying out obligations to the Government to the end that government contracts might be speedily and effectively performed." *Waxman v. United States*, 112 F. Supp. 570, 588 (Ct. Cl. 1953); *see Applied*

Cos., 144 F.3d at 1476 (recognizing that the Act "seeks to encourage the private financing of government contracts"). "When the Government receives [a valid] notice that an assignment of proceeds under a Government contract has been made [to a financing institution], it can no longer discharge its payment obligation under the contract by paying the contractor." *Produce Factors Corp. v. United States*, 467 F.2d 1343, 1349 (Ct. Cl. 1972).

"The Government has only a reasonable time to determine the validity of the assignment; thereafter the assignee is entitled to all amounts earned by the contractor's performance." *Produce Factors*, 467 F.2d at 1349.[1] If the Government pays amounts due under the contract to the contractor despite knowledge of a valid assignment, it risks having to pay the amounts due twice, since it remains liable for the same payment to the assignee:

> The Government having received timely notice of [the] assignment [to the assignee] paid [the contractor] at its peril. And where an erroneous payment is made by the Government it is no bar to the rightful claimant. A ministerial officer [within the Government] could not arbitrarily, without notice to the [assignee, the] legal holder of the claim, pay money over to a third party — in this case, [the contractor].

Central National Bank of Richmond, Virginia v. United States, 91 F. Supp. 738, 741 (Ct. Cl. 1950).

That is not to say that an assignment, once effected, can never be rescinded or terminated. An assignee financial institution's "interest in the proceeds due on [a] contract [is] to secure the loans made [by the financial institution to the contractor] to finance performance," and "[a]n assignment made as collateral security for a debt gives the assignee only a qualified interest in the assigned chose, commensurate with the debt or liabilities secured." *Beaconwear Clothing Co. v. United States*, 355 F.2d 583, 590 (Ct. Cl. 1966). That is, "[a]n assignee's recovery . . . is limited to the extent of that assignor's outstanding debt to the assignee." *American National Bank & Trust Co. of Chicago v. United States*, 22 Cl.

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[1] Heroes Hire complains that the VA contracting officer violated its rights under the "Small Business Prompt (Accelerated) Procedures Act" in June 2021 by delaying the processing of an invoice while awaiting corrected paperwork from FSW to implement the payment assignment. To the extent that this allegation bears upon Heroes Hire's defense to the VA termination decision, Heroes Hire has not identified any abuse of discretion. "[I]n light of the potential financial consequences of paying the wrong entity" after receiving a notice of assignment, it is not inappropriate for a contracting officer temporarily to withhold payment on an invoice while she ascertains who the correct payee is. *Mayberry Enterprises, LLC v. Department of Energy*, CBCA 5961, 20-1 BCA ¶ 37,616.

Ct. 7, 13 (1990). Nevertheless, the Government is not a party to the financial dealings between a contractor and its lender, and it has to rely on the assignor and the assignee to tell it if the circumstances giving rise to the assignment have concluded.

To that end, the Federal Acquisition Regulation (FAR) establishes a process by which a contractor can reestablish its payment rights once it has satisfied its obligations to the assignee of its contract payments. FAR 32.805(e)(1)(ii) provides that "[a] release of an assignment is required whenever . . . [t]he contractor wishes to reestablish its right to receive further payments after the contractor's obligations to the assignee have been satisfied and a balance remains due under the contract." 48 CFR 32.805(e)(1)(ii) (2020). If the assignee agrees to release the contractor from the assignment, the contractor must submit a written notice of release to the contracting officer evidencing that the assignee is relinquishing its rights to any further payments from the Government:

> If the assignee releases the contractor from an assignment of claims under a contract, the contractor, in order to establish a right to receive payment of the balance due under the contract, must file a written notice of release together with a true copy of the release of assignment instrument with [the contracting officer, any surety, and the disbursing officer designated in the contract to make payment].

Id. 32.805(e)(3).

Heroes Hire believes that FAR 32.805 does not require the assignee actually to sign or execute the written notice of release. Instead, according to Heroes Hire, the only signature that is required on the release provided to the contracting officer is the contractor's. The circumstances of this case show why we cannot interpret the FAR in the manner that Heroes Hire proposes.

An assignment of contract payments provides the assignee with, at the very least, a security interest (if not a more extensive transfer of ownership of the assignor's rights and property interests) in those contract payments. *Priority Between a Federal Tax Lien & an Assignment Under a Government Contract*, 60 Comp. Gen. 510, 513-14 (1981). That assignment constitutes "a transfer or setting over of property, or of some right or interest therein, from one person to another." *Black's Law Dictionary* 128 (8th ed. 2004) (defining "assignment"). "Once transferred, the assignor no longer has a right to enforce the interest because the assignee has obtained all the rights to the thing assigned." *Fagan v. Central Bank of Cypress*, No. 19-80239-CIV, 2021 WL 2845034, at *9 (S.D. Fla. June 28, 2021) (internal quotation marks omitted). If the assignee owns or at least has a security interest in Heroes Hire's contract payments, how could Heroes Hire, which has forfeited or at least surrendered its ownership rights over contract payments, have any ability on its own to

eliminate the assignee's security or ownership interest, without the permission of and without any written confirmation of release by the assignee? Heroes Hire's attempt to parse words in the FAR into individual components in a manner that would eliminate the need for an affirmative release by the assignee who owns the right to receive contract payments violates the purpose of a security interest and the concept of "ownership."

To the extent that Heroes Hire believes that the phrase "written notice of release" in FAR 32.805(e)(3) is ambiguous because it does not expressly state that the written notice of release must be "signed by the assignee," the FAR subsection preceding FAR 32.805(e)(3) clarifies the definition. FAR 32.805(e)(2), which deals with releases of assignments by an existing assignee in favor of a new assignee, expressly requires "[w]ritten notice of release of the contractor *by the assigning financing institution*." 48 CFR 32.805(e)(2)(i) (emphasis added). Reading FAR 32.805 as a whole, which we must when interpreting the language of a regulation, "and not to give force to one phrase in isolation," *see Glenn S. Podonsky*, GSBCA 14207-TRAV, 97-2 BCA ¶ 29,229, it seems clear that the definition of "written notice of release" in FAR 32.805(e)(2), which requires a release signature by the assignee, carries over and is intended to be defined similarly in FAR 32.805(e)(3). Releases in both FAR 32.805(e)(2) and (e)(3) must be signed by the assignee that is releasing the assignment.

Heroes Hire argues that there is no purpose in having the assignee sign the release where it is clear that the contractor's debt to the assignee is satisfied. To support its position that it has fulfilled its obligations to FSW, Heroes Hire has provided the Board with a page from a document that FSW submitted in an ongoing arbitration in which FSW purports to acknowledge that Heroes Hire has fully reimbursed FSW for all debts. Heroes Hire asserts that this page, coupled with the release that Heroes Hire signed, should be enough to require the VA contracting officer to vacate the assignment of payments to FSW. Yet, FSW has expressly told the VA contracting officer that it disputes Heroes Hire's assertion that the debt between them has been satisfied. That is a dispute between Heroes Hire and FSW. The Government cannot be placed in the position of trying to decipher whether there remains an outstanding balance between a contractor and its lender that warrants continuation of any assignment of payments. It is the contractor that entered into a financial arrangement with a financial institution that resulted in an assignment of payments. To the extent that the contractor fulfills its obligations to the financial institution in a manner that eliminates the basis of the assignment, it is the contractor that bears the burden of obtaining the necessary release – from the assignee – to support the discontinuation of the redirected contract payments. *See* 48 CFR 32.805(e)(3). Absent that, a contractor cannot put the Government into the middle of its dispute with the assignee. The double-liability ramifications to the Government of "guessing wrong" – that is, paying the contractor directly after assuming that the debt to the assignee is completely satisfied – are too significant to impose the burden on the Government of stepping into a dispute between the contractor and its lender assignee.

Heroes Hire complains that, even though it originally presented the assignment to the VA, the assignment here was defective and therefore invalid from its inception and that the VA contracting officer should never have recognized it in the first place. The original notice of assignment delivered to the VA mistakenly identified the "Indian Health Service," rather than the VA, as the agency with which Heroes Hire had contracted for nurse services. Further, it is less than clear from the current record whether FSW is the type of "financing institution" that the Anti-Assignment Acts contemplate as authorized to receive assignments of contract payments. *See* 31 U.S.C. § 3727(c); 41 U.S.C. § 6305(b)(1). Any mistake in the original assignment notice is, however, of no import. The Anti-Assignment Acts have "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 Arthur Pew Construction Co. v. Lipscomb*, 965 F.2d 1559, 1576 (11th Cir. 1992) ("The statute is for the protection of the United States only."). Accordingly, the Government is entitled to waive any objections to an assignment that would otherwise be in violation of the Anti-Assignment Acts. *Vermont Yankee Nuclear Power Corp. v. Entergy Nuclear Vermont Yankee, LLC*, 683 F.3d 1330, 1339 (Fed. Cir. 2012); *Delmarva Power & Light Co. v. United States*, 542 F.3d 889, 893-94 (Fed. Cir. 2008). Plainly, the VA did so here by accepting the assignment through a bilateral modification with Heroes Hire and by making payments directly to FSW, and Heroes Hire cannot now, after having originally presented the assignment to the VA, complain. Once the VA agreed to accept the assignment, it became bound by it and could not later choose to reject it without the assignee's consent. *See* 2 Karen L. Manos, Government Contract Costs & Pricing § 85:15, at 629 (2d ed. 2009) (Once the Government recognizes an assignment, "it is bound by the assignment.").

Heroes Hire also complains that the VA contracting officer has acted in bad faith by discussing the assignment with FSW without including Heroes Hire in those discussions and conspiring with FSW to preclude payment to Heroes Hire. We cannot see any support for Heroes Hire's bad faith allegation in the current record of this appeal. Under the FAR, the assignee, rather than the contractor, is the entity responsible for ensuring that the Government contracting officer receives the original notice of assignment. 48 CFR 32.805(b). Heroes Hire does not explain why, to the extent that the contracting officer had questions about the assignment, the contracting officer was not allowed to talk to the assignee to resolve those questions. Further, Heroes Hire has not explained why, after Heroes Hire provided the contracting officer with an assignment release signed only by Heroes Hire, the contracting officer was not allowed to communicate with FSW to attempt to obtain its signature on the release. That FSW informed the contracting officer, without copying Heroes Hire, that it would not sign the release and that Heroes Hire still owed it money does not establish bad faith on the contracting officer's part.

The discussion above addresses a portion of Heroes Hire's defenses to the termination for cause at issue in these appeals. It does not necessarily resolve the appeal, though, and the VA has not filed a motion seeking summary judgment on its termination decision. In further proceedings, however, Heroes Hire will not be able to rely on the VA's payment of contract proceeds to FSW, rather than directly to Heroes Hire, as a basis for challenging the VA's termination decision.

Decision

For the foregoing reasons, we lack jurisdiction to entertain Heroes Hire's request that the Board invalidate the assignment of payments to FSW and require the VA to pay future invoiced amounts directly to Heroes Hire. Accordingly, Heroes Hire's motion for emergency relief is **DENIED**. The Board further precludes Heroes Hire from relying on the VA's payment of contract proceeds to FSW, rather than to Heroes Hire, as a defense to the VA's decision to terminate Heroes Hire's contract for cause. On or before **October 20, 2021**, the parties shall confer and submit a proposed schedule for further proceedings in these appeals.

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

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge