

THE “ANTI-ASSIGNMENT OF CONTRACTS ACT”

The Right, and Wrong Way to Assign a Federal Contract

ASSIGNMENT OF A FEDERAL CONTRACT

In construction law, including government contracting, a party (assignor) to a contract may “assign” their rights and duties under the contract to another party (assignee) through an assignment agreement. Ideally, the assignor wants the assignee to step into his shoes and assume all of his contractual rights and obligations.

In order for the assignment of a *federal* contract to be valid, the contract must not prohibit¹ assignment, the government must be properly notified, and assignment must not be prohibited by law.

One such law that greatly restricts the ability of a contractor to assign a federal contract is the **Anti-Assignment of Contracts Act**² (the Act), which prohibits the transfer of any interest in a federal contract to another party unless at least one of three exceptions applies.

The first exception, allowed by statute, is that federal contracts may be assigned to **financial institutions** as long as the assignment is made to only one party, for the entire balance due on the contract, and the Assignee provides written notice of the assignment to the Contracting Officer, the sureties, and the Disbursing Officer for payment.

The second exception, as recognized by the courts, allows for assignment if the parties “waive” the restrictions of the Act through “clear assent to the assignment.”³ This waiver is typically done through a “**novation**” of the contract, where the parties involved agree to sign a new agreement, substituting a new party in place of the contractor under the same terms of the original contract.

The third exception, also recognized by courts, is that an assignment may be made by “**operation of law**” when a company experiences an event such as bankruptcy, mergers and acquisitions, or reorganization of the company.

¹ Typically, assignment is allowed unless specifically prohibited by contract language. Contract language may also limit the ability to assign, by restricting to whom or when a contract may be assigned, for example.

² 41 U.S.C. 6305.

³ See *American Government Properties v. United States*, No. 09-153, 10-541C & 11-486C (consolidated), (Fed. Cl., Aug. 28, 2014).

A BAD ASSIGNMENT

A recent example of how the Anti-Assignment of Contracts Act operates is the case of *American Government Properties*.⁴ In that case, the GSA awarded a contract to American Government Properties (AGP) to design and build an office facility in Louisiana. About one month after award, AGP entered into an assignment agreement with Houma SSA, LLC (Houma), a wholly owned subsidiary of AGP. In the agreement, AGP assigned all of its rights and interests in the contract to Houma, and Houma agreed to take on all of AGP's duties and obligations under the contract.

After nearly three years of performance and delay issues, the GSA terminated the contract for default. Two years after the termination, AGP submitted a certified claim to the contracting officer, seeking **\$4.2 million** in damages for wrongful termination. The contracting officer later issued a final decision assessing \$365,000 in **Liquidated Damages** and \$2.4 million in **reprocurement costs**, and then filed *another* final decision denying AGP's claim.

AGP *and* Houma then appealed the final decisions to the U.S. Court of Federal Claims. The Government moved to dismiss the case, arguing that the Anti-Assignment of Contracts Act prohibited AGP's assignment, and that none of the exceptions listed above applied. AGP did not argue that they were a financial institution or that the parties had executed a novation of the contract. AGP did argue, however, that the assignment fit under the "operation of law" exception because the assignment to Houma was like a corporate reorganization.

The court disagreed with AGP, explaining that a transfer by operation of law typically involves a corporation that undergoes a change in form or ownership, while *the corporation remains essentially the same*. Therefore, the court found that AGP **did not assign** the contract to Houma by operation of law because Houma was an entirely different entity. The court also pointed out that Houma did not maintain the same management or financial capabilities as AGP. Therefore, based on these findings, the court dismissed AGP's case.

CONCLUSION

The AGP case highlights the importance of knowing the laws and pitfalls involved in assigning a federal construction contract. Because AGP illegally and improperly handled the assignment to

⁴ *Id.*

Houma, its potential **multi-million dollar recovery** was dismissed along with its appeal. *However, had AGP agreed with the Government and Houma to execute a novation of the contract, the “waiver” exception would have applied and the court would not have dismissed the appeal on those grounds.*

As always, it is important to “see” all of the variables that may come into play on an assignment or other seemingly simple transaction. Consulting with an expert who has seen all of the variables in play can be the difference between recovering what is due under the contact, or losing out altogether.

In the end, you will be glad you made the call; by the way, it’s a FREE CALL.

EXCELL CONSULTING: “HERE TODAY FOR YOUR TOMORROW.”

Author’s note: The information contained in this article is for general informational purposes only. This information does not constitute legal advice, is not intended to constitute legal advice, nor should it be relied upon as legal advice for your specific factual pattern or situation. – Taylor Benson, Esq., Asst General Counsel