

LBCA

IN THE MATTER OF: MAHARAJ CONSTRUCTION, INC., APPELLANT

Contract Number: AE-10582-00-2 PY '98/99

Issue Date: January 25, 2005

For the Appellant: Joseph A. Manfredi, Esquire

Joseph A. Manfredi & Associates P.C.

For the Contracting Officer: Gary E. Bernstecker, Esquire

Office of the Solicitor

U.S. Department of Labor

For the Surety as Intervenor: Lynn D. Shavelson, Esquire

Wolff & Samson P.C.

DECISION AND ORDER RECOGNIZING STANDING OF SURETY AS INTERVENOR, AND ALLOWING
WITHDRAWAL OF APPEAL

Statement of the Case

This proceeding involves an appeal under the Contracts Dispute Act of 1978, as amended, [41 U.S.C. §§ 601](#) et seq. (the CDA) by the Appellant Contractor, Maharaj Construction, Inc. (Appellant, Maharaj, or the contractor) from a Notice of Termination issued pursuant to Section I, Federal Acquisition Regulation ([FAR](#)) [52.249-10](#), on June 22, 2001, following delays in the performance of the fixed price contract No. AE-10582-00-20 PY 98/99 for the construction of certain elements of the Edison Job Corps Center in Edison, New Jersey. [FN1] Maharaj advised of its intention to appeal to the Department of Labor (DOL) and the Contracting Officer on September 7, 2001. The Department of Labor Board of Contract Appeals (the Board) issued a Notice of Receipt of Appeal and Prehearing Order on September 12, 2001, which detailed certain actions to be taken by the parties in anticipation of a hearing of the appeal. The LeBlanc Law Firm, P.C. entered its appearance on behalf of Maharaj on October 15, 2001, and made the first of a series of requests for time extensions by Maharaj and the Contracting Officer which were granted. Maharaj's first such request was for a short extension of time to file a more appropriate complaint.

Under cover of a letter dated February 8, 2002, the Contracting Officer filed his Answer to the Complaint submitted by Maharaj on February 11, 2002, together with the Appeal File. The Board had not received a copy of the complaint to which the Contracting Officer responded. Acknowledging problems with the mail system stemming from the September 11, 2001, terrorist attacks, the Board issued a second Order Setting Prehearing Exchange on April 10, 2002. Further extensions were requested by the parties and granted. However, the Order Setting Prehearing Exchange issued April 10, 2002, and the Order Granting Extension issued January 15, 2002, were returned as unclaimed by Maharaj, and its counsel of record was so notified by letter dated May 28, 2002. The Contracting Officer filed his Prehearing Statement on June 7, 2002. By letter dated January 29, 2003, the Board advised Appellant's counsel of record, Wil LeBlanc, that the case had been dormant since June 6, 2002;

that correspondence had been returned unclaimed; and that the Board lacked a copy of the complaint to which the Contracting Officer had responded, and requested a status report preparatory to setting a prompt hearing date.

By letter dated February 3, 2003, counsel for Maharaj provided a copy of the Appellant's Complaint purportedly filed November 2001, and a copy of Appellants Pre-Hearing Exchange, together with an indication of intention to prosecute the appeal. A notice of hearing issued March 31, 2003, set May 5, 2003, as the date for start of the hearing.

On April 17, 2003 under correspondence dated April 14, 2003, the Contracting Officer filed a Motion To Stay Proceedings for sixty days, because the Surety for Maharaj, Lumbermen's Mutual Casualty Co. [FN2] (the Surety) sought to participate in settlement discussions. The Contracting Officer declared that the Surety and Maharaj had entered into a General Indemnity Agreement (GIA) and that the Surety was asserting rights of subrogation pursuant to that agreement and related bonds. The stay of proceedings was granted until June 13, 2003, by order dated April 17, 2003. In his June 13, 2003, status report, the Contracting Officer advised the Board that settlement discussions had not taken place, and that Maharaj's counsel, Wil LeBlanc, had declared that he was no longer representing Appellant. The Contracting Officer also advised that the Surety intended to withdraw Maharaj's appeal pursuant to authority of the GIA with Maharaj.

On June 30, 2003, the Surety filed a brief in support of its application to withdraw Maharaj's appeal of the Termination for Cause, asserting its right to settle Maharaj's claims against the Government Obligee under its bonds by withdrawing the appeal pursuant to the terms of the General Indemnity Agreement. The Surety asserted that it was completing the Contract under its performance Bond obligations to DOL and wished to settle DOL's contractual claims against the Surety and Principal, Maharaj. The Board issued an Order To Show Cause on July 2, returnable on July 15, later extended to July 22, 2003, directing

that the Appellant Contractor, or any other party, show cause, to be received by the Board not later than July 15, 2003, why this appeal should not be dismissed immediately with prejudice for failure to comply with an order of this Board, or dismissed as abandoned by the Appellant Contractor, Maharaj Construction, Inc., or why the Surety should not be permitted to intervene for the purpose of withdrawing the Appellant Contractor's appeal of the termination of the subject contract for cause with prejudice, or why the Surety's application should not be granted and the appeal dismissed with prejudice.

In response, counsel for the Surety advised by letter dated July 7, 2003, received July 8, 2003, that copies of the Surety's application to withdraw Maharaj's appeal challenging the termination for cause of the contract under the Surety's assignment rights under the general indemnification agreement had been transmitted to the Board. Also in response, on July 8, 2003, Joseph A. Manfredi & Associates P.C. entered its appearance on behalf of Maharaj, substituting for Wil LeBlanc with his indicated consent. By letter dated July 21, 2003, new counsel for Maharaj objected to the Surety's application for withdrawal of the appeal of the default termination.

On August 8, 2003, the Board issued an Order To Brief Issue of Standing which directed the parties to advise the Board no later than August 22, ultimately extended to September 26, 2003 on what basis, if any, the Surety could establish standing before the Board which would allow the Surety to withdraw the appeal over the Appellant's objection. Maharaj filed its brief on the issue of standing by letter dated September 25, and received September 30, 2003. The Contracting Officer advised by letter dated September 26, 2003, that the Contracting Officer had no

position on the issue of standing or authority to withdraw the appeal. The Surety filed its brief on September 26, 2003.

The Surety's Position

The Surety asserts its right to settle Maharaj's affirmative claims against the Obligee by withdrawing the appeal pursuant to the authority of the General Indemnity Agreement (the GIA) between the Surety and Principal, Maharaj and the individual Co-Indemnitors. The Surety asserts that under the GIA it has the right to settle claims at its sole discretion, both third party claims and its Principal's affirmative claims against the Obligee, DOL. The Surety further asserts that Maharaj's appeal has no likelihood of success on the merits. Specifically, the GIA provides that the Principal assigned all contractual claims to the Surety and appointed the Surety as the Principal's attorney in fact, which entitles the Surety to exercise all of the assigned rights, including the right to withdraw the Principal's appeal of the Obligee's termination of the Contract for default in accordance with the principles enunciated in [Hutton Constr. Co., Inc. v. County of Rockland, 52 F.3d 1191 \(2d Cir. 1995\)](#). The Surety and DOL also executed a Takeover Agreement dated April 10, 2002, which acknowledged the Surety's right to exercise the assigned rights, and specifically to the affirmative claims of its principal, Maharaj, from the inception of the Contract. The Surety asserts that this comprehensive assignment includes Maharaj's right to challenge the Contracting Officer's termination for default and to withdraw Maharaj's appeal.

The Board concludes that there is no substantial dispute with respect to the Surety's assertion that it engaged a completion contractor, undertook completion of the Contract under the Performance Bond, incurred substantial costs of completion and financial losses attributable thereto, and seeks to settle the Contracting Officer's contractual claims against the Surety and Principal, Maharaj. There is no dispute that the Contracting Officer, who has taken no position with respect to the contested issue of the Surety's standing as a party before this Board, has required that the Surety withdraw Maharaj's appeal as a condition precedent to settlement. Among the contractual claims involved is the Contracting Officer's claim for liquidated damages for delayed performance against the Contractor. The Surety also asserts without significant contradiction that it has sustained substantial losses in satisfying its Performance Bond obligations. Its demands for indemnification against Maharaj and the Co-Indemnitors pursuant to the GIA have been futile. The Surety asserts that the resulting breach of contract entitles it to invoke the assignment under the GIA and enforce its rights of subrogation.

Surety asserts, in response to Maharaj's opposition, that neither the express terms of the GIA nor case law restricts the Surety's assignment rights, as Maharaj contends, until resolution of Maharaj's claims against the Contracting Officer. The Surety relies upon [Hutton Constr. Co., Inc. v. County of Rockland, 52 F.3d 1191 \(2d Cir. 1995\)](#). In response to Maharaj's contention that the existence of disputed facts regarding the merits of its claims against the Contracting Officer bars summary judgment under [Fed. R. Civ. P. 56](#), the Surety contends that the critical material fact, that its Principal, Maharaj, breached the GIA when it failed to indemnify the Surety on demand, is not in dispute, and that Maharaj could have preserved its right to pursue its claims by posting collateral on Surety's demand, but did not do so. The Surety also categorically denies Maharaj's suggestion that the request for withdrawal of the appeal evinces bad faith. Partly in this regard, the Surety asserts that any collections that Maharaj might effect would, under the circumstances, be owed to the Surety as indemnification.

Maharaj's Position

Maharaj has conceded that the GIA provided for the assignment of all Maharaj's

contractual claims to the Surety and made the Surety Maharaj's attorney in fact. However, Maharaj contends that the Surety's exercise of the right is untimely due to questions of fact regarding the quality of Maharaj's work on the project because summary disposition in the nature of a summary judgment under [Fed. R. Civ. P. 56\(e\)](#) is precluded unless there is no genuine issue as to any material fact. Maharaj contends that unresolved questions of fact regarding the quality of Maharaj's Contract performance would bar such a summary disposition.

Maharaj contends that the Board cannot authorize withdrawal of Maharaj's appeal because the Surety does not have standing before the Board to withdraw the appeal. Maharaj attributes the lack of standing to an assertion that the Surety does not qualify as a contractor in privity with the government enabled to file a claim or appeal under the CDA, because only Maharaj contracted with the government. Maharaj contends that, because the government is not a party to the GIA between Maharaj and the Surety, the Board has no jurisdiction over that contract under the Act. And Maharaj contends that, because the Surety has assertedly not taken over completion of the contract, it is not entitled to equitable subrogation, and that, even if it had, the Surety would only have prospective rights against the government for work performed by it after the termination of Maharaj for default.

Maharaj also contends that the Anti-Assignment Act, [41 U.S.C. § 15\(a\) \(2000\)](#), and [31 U.S.C. §§ 3727\(a\)\(1\), \(b\) \(2000\)](#) would bar the Surety's assertion of rights that purport to have been assigned or be assignable under the GIA, at least as to claims against the government arising prior to a takeover of the project, and at least until any such claims have been allowed in an amount certain. Maharaj also contends that the Surety's effort to withdraw Maharaj's appeal before Maharaj has an opportunity to litigate its claims on the merits evinces bad faith and breach of an implied warranty of good faith on the part of the surety by impairing Maharaj's rights to enjoy the fruits of the contract. Maharaj also suggests that a conflict of interest inheres in the Surety's use of Lovett as completion contractor because Lovett did inspections for Maharaj that did not disclose defects in work subsequently disclosed to the Surety after termination of the contract for default.

Discussion, and Conclusions of Law

Although the parties disagree fundamentally about the applicable law, the record does not evidence disagreement as to material facts. Maharaj's unsupported factual assertions, to the extent material, are so patently erroneous in crucial respects that they do not put material facts in substantial dispute. For example, Maharaj's suggestion that the Surety had not taken over completion of the project is clearly contradicted by the Surety's assertion to the contrary and the evidence of the Takeover Agreement. There has been no serious attempt to refute the material facts averred by the Surety in support of its position on the narrow issues presently to be resolved by the Board. The GIA, together with the Takeover Agreement executed by the Contracting Officer and the Surety on April 10, 2002, which was submitted as part of the Surety's brief on its standing, give the Surety the authority to settle Maharaj's appeal. [FN3] Recognition of the Surety's authority is in keeping with the policy of encouraging suretyship in the construction industry. Sureties enjoy such discretion to settle claims because of the important function they serve in the construction industry, and because the economic incentives motivating them are a sufficient safeguard against payment of invalid claims. [General Accident Ins. Co. of Amer. v. Merritt-Meridian Construction Corp., 975 F. Supp. 511, 520 \(S.D.N.Y. 1997\)](#).

Maharaj's several arguments as to why the Surety lacks the authority to settle Maharaj's appeal are without merit, in significant part because Maharaj has missed the significance of the Takeover Agreement executed by the Surety and the Contracting Officer on April 10, 2002.

GIA

The Surety's right to settle Maharaj's claims is based on the express language of the GIA and the Takeover Agreement. Two clauses of the GIA are particularly relevant. First, the Assignment Clause assigns, transfers, pledges, and conveys to surety . . . (A) All rights in connection w/ any contract, including but not limited thereto: . . . (3) any and all sums of which may thereafter become due under said contracts and all sums due on all other contracts . . . in which any or all of the undersigned have an interest. Second, the Attorney in Fact Provision grants the Surety the right to exercise all of the rights assigned to the Surety under the GIA. These powers are recognized and confirmed by Paragraph 17 of the Takeover Agreement, which provides, Owner [DOL] further recognizes the assignment to Surety of all of Principal's rights and claims under the Contract and the Surety expressly preserves all potential claims that it may have against Owner with regard to payments made to Principal prior to the execution of this Takeover Agreement.

The Second Circuit Court of Appeals interpreted a nearly identical indemnity agreement to allow a surety to settle the principal's affirmative claims. [Hutton Construction Co. v. County of Rockland, 52 F.3d 1191 \(2d Cir. 1995\)](#). In Hutton, the County of Rockland (County) contracted with Hutton for the installation of sewer pipe. Hutton entered an indemnity agreement with two sureties. The County ultimately terminated Hutton's contract. The County asserted claims against Hutton and its sureties for the cost of completing and correcting Hutton's work. Hutton countersued for failure to provide adequate plans and specifications, for costs incurred from unanticipated subsurface conditions, and for wrongful termination of the contract. The sureties advanced funds to Hutton so that it could prosecute its claims and incurred other expenses chargeable to Hutton under their agreement. The sureties demanded that Hutton indemnify them for their losses. Hutton failed to do so.

Prior to trial, the County and the sureties agreed to a settlement that disposed of the County's claims against Hutton as well as Hutton's claims against the County. Hutton did not take part in the settlement agreement. After the settlement, the sureties moved to dismiss the action. Hutton opposed the motion claiming that triable issues of fact existed as to whether the sureties had the right to settle Hutton's claims and whether such right, if it existed, was barred. The court concluded that Hutton's failure to make the demanded indemnity payments was a breach of Hutton's obligations to the sureties and thus activated the Assignment Clause, thereby causing assignment to the sureties of all Hutton's rights growing out of the construction contracts. The Assignment Clause in Hutton did not give the sureties the express authority to settle Hutton's affirmative claims. The court concluded, however, that the Attorney in Fact Provision provided sufficient authority for the sureties actions.

Like Hutton, Maharaj contracted with the Surety to assign all its claims and to designate the Surety as its attorney in fact. Following termination for default of the contract with the government, Maharaj failed to indemnify the Surety, or post appropriate collateral, and the Surety expended substantial sums for contract completion, and is attempting to settle Maharaj's affirmative claims. Hutton is on point for the authority of the Surety to do so. Because the Federal government was not involved with the contract in Hutton, and Hutton contracted with the County of Rockland, the Anti-Assignment Act was not implicated. The significance of the Anti-Assignment Act to Maharaj as principal and the Surety is discussed separately, infra.

Maharaj's several arguments, that the exercise of the Surety's authority was untimely, that the Sureties acted in bad faith, that the CDA bars the action, that the Surety's action is prohibited by the Anti-Assignment Act, and that a conflict of interest inheres in the Surety's choice of completion contractors, lack merit and, consequently, do not prevent the Surety from withdrawing Maharaj's appeal.

The Timeliness of the Sureties Action

In its initial letter brief dated July 21, 2003, Maharaj conceded that the GIA provided for assignment of all Maharaj's contractual claims and made the Surety Maharaj's attorney in fact. Maharaj argued, however, that the Surety's exercise of that power was untimely because of unresolved questions of fact regarding the quality of Maharaj's work. These questions, however, are irrelevant to the contractual issues before the Board. Neither the language of the GIA nor the interpreting case law restricts the Surety's exercise of its assignment rights until after a decision on the merits of the principal's claim. If Maharaj wanted to preserve its right to litigate these issues, it should have posted collateral upon the Surety's demand. When Maharaj failed to do so, the Assignment Clause was invoked.

Bad Faith

Maharaj's allegations of bad faith are frivolous. Conclusory allegations of bad faith are insufficient to defeat a motion for summary judgment in favor of a surety seeking to enforce an indemnification agreement. [General Accident Ins. Co. of Amer. v. Merritt-Meridian Construction Corp., 975 F. Supp. 511, 522 \(S.D.N.Y. 1997\).](#) Maharaj argues that any action by the Surety to impede Maharaj's ability to defend itself amounts to bad faith. Maharaj has ignored the Takeover Agreement and the Surety's expenditures to complete performance of the contract following Maharaj's termination for default. Maharaj has not attacked the bona fides of the GIA or Takeover Agreement. The Surety's decision to dismiss Maharaj's claims and reach a settlement with DOL is permissible pursuant to a comprehensive assignment of its rights under the GIA. There is no actual evidence of bad faith. Maharaj's contention that the Surety's selection of its completion contractor involved conflict of interest is not shown to be relevant or material to the issues which must presently be resolved.

The CDA

Maharaj contends that the Surety does not qualify as a contractor entitled to prosecute a claim before this Board under the CDA, and that this Board is without jurisdiction to grant relief sought by the Surety. [FN4] However, Maharaj's reliance upon [Admiralty Constr., Inc. v. Dalton, 156 F.3d 1217 \(Fed. Cir. 1998\)](#) is misplaced. Because of patently distinguishable circumstances in the Admiralty case, that surety was held to be neither a contractor nor an entity in privity with the government with standing under the CDA. In Admiralty like the instant appeal the contractor and surety executed a GIA which provided for an assignment upon default of the contractor's rights under the contract to the surety and for a power of attorney to exercise those rights. In neither case was the government a party to the GIA. But in Admiralty, unlike the instant appeal, there was no takeover agreement and the surety did not complete or finance the completion of the construction project, or undertake to do so. Consequently, the surety did not establish privity with the government, or equitable subrogation to the rights of the contractor vis->-vis the government. [FN5] Moreover, the board of contract appeals was held to be without jurisdiction to adjudicate the claims under the GIA because the government was not a party to that contract.

In contrast with the instant appeal, the Surety has satisfied its burden of

establishing that it has standing to prosecute its claim. It is not disputed that after DOL's termination of Maharaj for default, the Surety's demand for indemnification under the GIA was unsatisfied. There is no showing that the Surety did not execute a takeover agreement with DOL, engage a contractor, and finance completion of the project, as alleged, and evidenced, inter alia, by the Takeover Agreement. In such circumstances, it is settled law that the Surety, in effect as a contractor, can exercise all of the assigned rights of the defaulted contractor, provided that it is not barred by the Anti-Assignment Act. See [Safeco Ins. Co., ASBCA No. 52,107, 03-2 BBCA ¶ 32,341, 2003 WL 21783795 \(July 30, 2003\)](#) (express assignment of contractor's rights under contract, irrevocable power of attorney to surety, takeover agreement and government's knowledge of assignment, entitled surety to pursue claims); [Ins. Co. of the West, 88-3 BCA ¶ 21,056, 1988 WL 83978 \(July 20, 1988\)](#) (takeover agreement and surety's performance of contract accorded surety standing as contractor)

Anti-Assignment Act

Maharaj also relies upon the ruling in [Fireman's Fund Insurance Company v. England, 313 F.3d 1344 \(Fed. Cir. 2002\)](#), by the United States Court of Appeals for the Federal Circuit that the Anti-Assignment Act annulled an assignment clause in an indemnity agreement that was similar to the GIA at issue in the present case. Again, Maharaj's reliance is misplaced. In Fireman's Fund, the United States Navy contracted to construct a government building. The construction contractor executed a surety agreement with Fireman's Fund Insurance Company. After the contractor defaulted on the government contract, Fireman's Fund executed a takeover agreement with the government and completed the work. The government assessed liquidated damages against Fireman's Fund for delays in doing the work. Fireman's Fund appealed the assessment of liquidated damages. [FN6] The Armed Services Board of Contract Appeals ruled that Fireman's Fund lacked standing to appeal the damages because the assignment of Summit's claim was annulled under the Anti-Assignment Act. Fireman's Fund Insurance Co., [ABSCA No. 50657, 00-1 BCA \(2002\)](#). The Federal Circuit affirmed. [Fireman's Fund, 313 F.3d at 1351](#).

The Anti-Assignment Act consists of two provisions, [41 U.S.C. § 15\(a\)](#) and [31 U.S.C. § 3727](#). [Section 15\(a\)](#) provides that no contract . . . or any interest therein, shall be transferred by the party to whom such contract . . . is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. [FN7] [Section 3727\(a\)\(1\)](#) provides that an assignment of any part of a claim against the United States Government or of an interest in the claim . . . may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued. In Fireman's Fund, the Federal Circuit interpreted these provisions together to prohibit transfers of contracts involving the United States and assignment of claims against the United States. The court reasoned that such contracts could be transferred and such claims assigned only after the claims have been allowed in a specific amount and provisions have been made for their payment.

Maharaj relies on the Anti-Assignment Act and Fireman's Fund to argue that its assignment to the Surety is invalid and should not be enforced. This argument is also without merit. The Anti-Assignment Act was intended for the protection of the government. This section is for the protection of the United States only, and does not affect the rights of the parties to such a transfer. [Hegnness v. Chilberg, 224 F. 28 \(9th Cir. 1915\)](#). A valid assignment of a government contract may be enforceable between the parties even though it might be challenged by the United States. [United Pacific Insurance Co. v. Tiber Access Industries Co., 277 F. Supp. 925 \(D.C. Or. 1967\)](#). This section is intended for the protection of the Government, which may treat a contract as annulled thereunder by an assignment, or recognize the assignment. [Dulaney v. Scudder, 94 F. 6 \(5th Cir. 1899\)](#). The Anti-Assignment

Act does not allow Maharaj to enter a consensual agreement and then avoid the consequences of that agreement by relying on the Act. In Fireman's Fund, the Government, not the contractor, challenged the contractor's assignment under the Anti-Assignment Act.

In contrast, in [Safeco Ins. Co. of America, 03-2 BCA ¶ 32,341 \(2003\)](#), not addressed by Maharaj, but relied upon by the Surety, the Armed Services Board of Contract Appeals distinguished Fireman's Fund because it questioned whether [the] general indemnity agreement actually assigned any claim belonging to the original contractor to the surety and found no evidence that the Government was party to, aware of, or consented to the general indemnity agreement. In Safeco, as in the instant case, the contractor not only explicitly assigned the rights to its contract with the government to the surety and appointed the surety as its attorney in fact, but the government was clearly aware that the contractor had relinquished and assigned all of its contractual rights to the surety. In Safeco, the Government did not challenge the surety's right to seek recovery of the contractor's costs. In the instant case the Surety is in privity with DOL because of the Takeover Agreement which incorporates by reference the totality of the assignment and power of attorney effected by the GIA. Moreover, DOL has waived the application of the Anti-Assignment Act and approved the assignment by executing the Takeover Agreement with its reference to the GIA and by conditioning settlement discussions with the Surety upon the Surety's withdrawal of Maharaj's appeal. The Anti-Assignment Act, therefore, is no bar to the Surety's assumption of Maharaj's rights under the contract, or the Surety's standing to prosecute claims, to settle Maharaj's appeal to this Board, or to withdraw Maharaj's appeal to this Board.

ORDER

Appellant's opposition to the intervention of the Surety based upon lack of standing under the CDA is overruled; Surety's standing under the CDA as a contractor to intervene as a party in interest and to apply to this Board to allow the withdrawal of the appeal of Maharaj is sustained. Surety's application to withdraw the appeal of Maharaj Construction, Inc. is granted. The appeal of Maharaj Construction, Inc. is dismissed as withdrawn.

Edward Terhune Miller

Judge, LBCA

Concur:

John M. Vittone

Chairman, LBCA

Stuart A. Levin

Judge, LBCA

FN1. The contract was for construction of an addition to Culinary Arts/Gym/Classrooms, a new Dormitory and a new Administration Building.

FN2. The Surety also included Universal Bonding Insurance Company, which issued the payment and performance bonds pertinent to the project.

FN3. Paragraph 17 of the Takeover Agreement provides:

This takeover Agreement is not intended to create and shall not be construed as

creating or conferring any rights in favor of any person or entity other than owner and surety. Nor shall this Takeover Agreement be construed as compromising any rights that Surety may have against the principal. This Takeover agreement does not waive or alter any rights or claims that owner and principal may have as against each other under the contract, including principal's right, if any, to challenge the termination of the contract. Owner further recognizes the assignment to Surety of all of principal's rights and claims under the contract, and the Surety expressly preserves all potential claims that it may have against owner with regard to payments made to principal prior to the execution of this Takeover Agreement (emphasis supplied).

FN4. The CDA provides that a contractor may bring an action directly on the claim. [41 U.S.C. § 609\(a\)\(1\)](#). In [Admiralty Constr., Inc. v. Dalton, 156 F.3d 1217 \(Fed. Cir. 1998\)](#), the Federal Circuit held that a surety was not a contractor under the CDA. [Admiralty, 156 F.3d at 1220](#). The court read the CDA as providing, in effect, that only a contractor could bring an action directly on a claim, and that the surety in that instance did not qualify as a contractor. The court reasoned that the express inclusion of contractors excluded other parties from filing claims by implication, and noted that this single point of contact prevents multiple, duplicative claims and appeals. [Id. at 1220](#) (citing [S. Rep. No. 95-1118](#), at 16). These concerns, however, do not apply in the instant appeal.

FN5. The Surety notes the distinction between two lines of cases recognized in [Firemen's Fund Ins. Co., ASBCA No. 50, 657, 00-1 BCA 30,802](#), aff'd 313 F.2d 1344 (Fed. Cir. 2000) as pertaining to certain critical circumstances affecting the effect of assignments: on the one hand, where the contracting officer consents to the assignment or incorporates it in a novation or takeover agreement executed by the contracting officer, in which case the Surety has standing to prosecute such claims before the Board, see [Ins. Co. of the West, ASBCA No. 355253, 88-3 BCA ¶ 21,056 at 106,347](#); and on the other hand, where such standing is lacking absent such an assignment, novation, or takeover agreement incorporating the defaulting contractor's assignment because the surety lacks privity of contract with the government at the time the claim arose. In [Firemen's Fund](#), the government was not aware of the GIA, and did not consent to it. The takeover agreement made no mention of the GIA or the assignment of any of the contractor's claims to the Surety. As a consequence, the surety was held to lack standing to prosecute pretakeover affirmative claims against the government under circumstances manifestly distinguishable from those of the instant appeal.

FN6. As with [Admiralty](#), [Fireman's Fund](#) involved an appeal initiated by the surety rather than a claim settled by the surety. Unlike the CDA, the distinction is not important under the Anti-Assignment Act. The Act broadly restricts assignments of claims involving the United States and does not focus on the initiation of claims.

FN7. An alternate basis for the court's holding was the CDA's limitation of appeals to contractors. As discussed above, this exception is inapplicable to the present case.