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| **HOOD LUMBER COMPANY, FORMERLY HANEL LUMBER CO., INC.,** | ) | **AGBCA No. 98-156-1** |
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| Appellant | ) | |
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| **Representing the Appellant:** | ) | |
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**RULING ON GOVERNMENT'S MOTION TO DISMISS AND APPELLANT'S MOTION TO SUBSTITUTE QUALITY VENEER AND LUMBER CO., INC., AS APPELLANT**

September 2, 1999

**OPINION BY ADMINISTRATIVE JUDGE ANNE W. WESTBROOK**

This appeal is taken from a Contracting Officer's (CO's) decision involving Contract No. 077378, known as the Enola Timber Sale awarded to Hanel Lumber Co., Inc., of Hood River, Oregon, on September 8, 1995. On March 19, 1998, the Board received a Notice of Intent to Appeal dated March 16, 1998. The subject line contained the names Hanel Lumber Co., Inc., and Bugaboo Timber Company as well as the name and number of the contract. The Notice of Intent to Appeal referred to Hanel Lumber Co., Inc. (now owned by Bugaboo Timber Company), and contained three other references to Hanel and Bugaboo. On March 26, 1998, the Board docketed the appeal as Bugaboo Timber Company, Appellant (formerly Hanel Lumber Co., Inc.). Subsequently, as the result of an April 27, 1998 request by Appellant, the name of the appeal was changed to "Hood Lumber Company, formerly Hanel Lumber Co., Inc." The Complaint was filed June 30, 1998, in

the name of "Hood Lumber Company (formerly Hanel Lumber Co., Inc.)." The Complaint contained no allegations regarding when and how Hanel Lumber Co., Inc., became Hood Lumber Company.

The Government filed an Answer and, later, a Motion to Dismiss, arguing that at the time the notice of appeal was filed on behalf of Hanel Lumber Company, Inc. (now owned by Bugaboo Timber Company), all claims of the Bugaboo Timber Company were the property of Bugaboo's Chapter 7 bankruptcy estate. Thus contended the Government, the Chapter 7 Trustee was the only entity with authority to pursue an appeal on behalf of Bugaboo Timber Company. Appellant filed an Opposition to the Government's Motion to Dismiss for Lack of Jurisdiction. The Government filed its Response to Appellant's Opposition; Appellant filed its Supplemental Opposition; the Government filed its Response to the Supplemental Opposition and finally Appellant provided a Reply to the Government's Response to Appellant's Supplemental Opposition. Appellant's Supplemental Opposition included a motion to substitute Quality Veneer and Lumber Co., Inc. (QVL), as Appellant. Each of these filings contained additional allegations and supporting documents. The factual background, as it unfolded in the reading of these sequential submissions, will be outlined in the findings of fact.

The Board's jurisdiction arises under the Contract Disputes Act (CDA) of 1978 (41 U.S.C. §§ 601-613).

The Board here rules on the Government's Motion to Dismiss for Lack of Jurisdiction and on Appellant's motion to substitute QVL as the Appellant in this appeal. For the reasons set out below, both Motions are denied.

## FINDINGS OF FACT

1. In 1990 the Forest Service advertised the Enola Timber Sale. Bid opening was August 7, 1990. (Appeal File (AF) 151-54.) Hanel Lumber Co., Inc. (Hanel), of Hood River, Oregon, was the high (and only) bidder. (Supplemental Appeal File (SAF) tab 5, page unnumbered.) By letter dated August 9, 1990, the Contracting Officer (CO), wrote Hanel stating that he would not make a decision about awarding the sale until he knew the outcome of an administrative appeal (SAF tab 6, page unnumbered). On October 18, 1994, Hanel wrote the CO requesting that award be made and a prework meeting scheduled (SAF tab 6, page unnumbered). Award was made to Hanel on September 8, 1995. The notice of award stated that the contract had been reformed and the new "Termination Date" was July 2, 1997 (AF 227). Robert L. Hanel, President, signed the Timber Sale Contract No. 077378 on behalf of Hanel; the contract showed the award date of September 8, 1995, and the termination date of July 2, 1997 (AF 235). Correspondence between Hanel and the CO was sent to and from him at Mt. Hood National Forest, 2955 NW Division Street, Gresham, Oregon 97030.

2. Clause B8.4 of the contract provides as follows:

> The acquisition or assumption by another party under an agreement with Purchaser of any right or obligation of Purchaser under this contract shall be ineffective as to Forest Service, until Forest Service has been notified of such agreement and has given written approval by the forest officer who approved this contract, his successor or superior officer; and in no case shall such recognition or approval:
>
> (a) Operate to relieve Purchaser of the responsibilities or liabilities he has assumed hereunder; or
>
> (b) Be given unless such other party:
>
> (i) Is acceptable to Forest Service as a purchaser of timber and assumes in writing all of the obligations to Forest Service under the terms of this contract as to the uncompleted portion thereof, or
>
> (ii) Acquires the rights in trust as security and subject to such conditions as may be necessary for the protection of the public interests.

(AF 268.)

3. On August 29, 1995, Hanel, Hanel's shareholders, and The Morgan Company (TMC) entered into a Stock Purchase Agreement whereby all outstanding shares of Hanel stock were sold by the shareholders to TMC. Exhibit 1 to the "Supplemental Opposition of Appellant Hood Lumber Company to the Government's Motion to Dismiss for Lack of Jurisdiction" filed with the Board April 9, 1999, is a Stock Purchase and Redemption Agreement dated as of August 29, 1995. Hanel shareholders were identified as the Sellers and TMC as the Purchaser. Both Hanel and TMC were identified as Oregon corporations.

4. On April 10, 1996, James D. Morgan, President sent a letter to the Mt. Hood National Forest, subject: "Change of Ownership/Timber Sales Representatives" to clarify previous correspondence as to the changes in ownership of Hanel effective November 7, 1995. The signature block did not identify the entity of which he was president. The letterhead was of "Hanel Lumber Co., Inc., a Morgan Company." Enclosed with the letter was a copy of minutes of a special meeting of the Board of Directors of Hanel recording the election of officers of Hanel, including Mr. Morgan as president. (AF 456-7.) The record is silent as to how long before April 10, 1996, the Forest Service was made aware of the change in ownership.

5. On April 4, 1997, using the letterhead of Bugaboo Timber Company (Bugaboo), James D. Morgan submitted a claim on this contract along with a claim on the Schreiner Timber Sale. He indicated he was writing on behalf of "Hanel Lumber Company (now owned by Bugaboo Timber

Company)" regarding the Enola sale and on behalf of Bugaboo regarding the Schreiner sale. His signature block included the names of both companies under his title of president. The letter contained a claim certification in the CDA language (AF 349-57). Subsequently, in July 1997, the parties settled those claims and others in a single settlement agreement in which it was recited that Hanel was "now owned by The Morgan Company, and Bugaboo Timber Company and that they were therein referred to collectively as "Bugaboo" (AF 338-44). There is no evidence that Bugaboo ever acquired interest in Hanel.

6. By April 25, 1997, the timber sale had been completed and the Forest Service CO wrote Hanel advising that the sale had been closed on Forest Service records. Any claim should be filed in accordance with contract provision C9.21 - Submission of Claims and within the limits stated in C9.21(c) (AF 347).

7. By letter dated June 23, 1997, Mr. Morgan, as president of Bugaboo and Hanel, submitted the claim which is the subject of this appeal. He used Bugaboo letterhead and referred to Hanel as "now owned by Bugaboo Timber Company." Immediately above Mr. Morgan's signature block as president of Hanel and Bugaboo, was the CDA certification. (AF 1-5.)

8. Effective August 8, 1997, Hanel and four other subsidiaries of TMC were merged into TMC and the name was changed to Hood Lumber Company. These actions took place pursuant to Articles of Merger under Oregon law (Exhibit 3 to Supplemental Opposition of Appellant Hood Lumber Company to the Government's Motion to Dismiss for Lack of Jurisdiction (Supplemental Opposition)). According to Appellant's Third Amended Disclosure Statement (June 1, 1998) filed in the United States Bankruptcy Court for the District of Oregon, the merger was preparatory to filing a voluntary petition under Chapter 11 of Title 11 of the United States Code. The aim was to reduce the administrative costs which would accrue from six separate filings. Hood filed the voluntary petition on August 11, 1997.

9. According to the Third Amended Disclosure Statement, Bugaboo was not a subsidiary of TMC, later Hood, but was an affiliated company. Hood also stated that the primary reasons that it filed the Chapter 11 case related to losses incurred by "its sister corporation, Bugaboo." Hood had indemnified Bugaboo with its surety and Hood and Bugaboo were joint borrowers on a line of credit. The Disclosure Statement also reported that the United States Trustee had appointed an examiner for the purpose of examining Hood's pre-petition transactions with related companies. The examiner was to investigate whether any of the pre-petition transactions were avoidable. He concluded that the condition of the business records was such that he could draw no definitive conclusions regarding the net obligations between and among the various "affiliates." The trustee for Bugaboo filed a motion to consolidate the Bugaboo and Hood bankruptcy cases. Hood's Creditors Committee and the surety filed objections. Bugaboo's creditors also filed an unsecured claim in the approximate amount of $25,000,000 against Hood. Hood claimed that Bugaboo owed it approximately $10,000,000. (Exhibit 5 to the Supplemental Opposition.)

10. The CO issued his decision denying the contractor claim that is the subject of this appeal on December 18, 1997. It was addressed to Hanel Lumber Co., Inc., Attn: Jim Morgan. Therein, the CO made the finding that "on November 7, 1995, Hanel was acquired by Bugaboo Timber Co. (Morgan Co.)." The CO also stated that at the time Bugaboo acquired Hanel, the Enola Timber Sale had already been awarded to Hanel. He also stated that the timber sale was part of the acquisition. The CO did not explain how he drew those inferences (AF 24-7).

11. On March 16, 1998, Hanel sent a Notice of Intent to Appeal to the Board styled as Hanel (now owned by Bugaboo Timber Company). The Board docketed the appeal in the name of Bugaboo and so notified the parties on March 26, 1998. On April 27, 1998, Appellant's counsel contacted the Board in reference to the instant appeal advising that "it should be Hood Lumber Company, formerly Hanel Lumber Co., Inc., instead of Hanel Lumber Company, Inc. (now owned by Bugaboo Timber Company) as stated in our March 16, 1998 letter."

12. The Third Amended Disclosure Statement reported that as of April 28, 1998, Hood, as an Oregon corporation and a debtor-in-possession in bankruptcy, had entered into an Asset Purchase Agreement with Dimeling, Schreiber & Park (DS&P), a Pennsylvania general partnership to sell "substantially all" of Hood's assets. Exhibit 4 to the Disclosure Statement is the First Amended Restated Asset Sale and Purchase Agreement (Agreement) between Hood and DS&P. It provides that Hood agreed to sell and DS&P agreed to buy all of Hood's tangible and intangible assets, except certain excluded assets, including but not limited to a specified list of assets. Among those identified as sold were all names used by the seller, including Hanel (and other specified names); "causes of action and claims against any person or entity, other than those released under the Plan of Reorganization" and all claims of Hood and its estate against any of its affiliates arising under Chapter 5 of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq. Excluded assets included the names "Morgan Company" and "Hood Lumber Company"; "the Truck Shop improvements and real property"; "the old Simpson Plywood Mill and associated real property (approximately 15 acres)"; some prepaid accounts; all claims against Bugaboo; and, several other enumerated items. The Agreement also contained a list of included assets (Exhibit 4 to Exhibit 5 to the Supplemental Opposition).

13. On June 1, 1998, the Clerk, U.S. Bankruptcy Court, District of Oregon, docketed the Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan and Notice of Confirmation Hearing. The court found that the "final" form of the disclosure statement dated June 1, 1998, contained adequate information and approved it.[1] The last day for filing written ballots accepting or rejecting the plan or amended plan was to be July 2, 1998. A hearing on the plan would be held July 9, 1998. Attached was a 19 page mailing matrix. The "United States Forest Service, 333 SW First, Portland, OR 97204" was listed as was "USDA Forest Service, Attention Forest Products, P.O. Box 3623, Portland, OR 97208-3623." Neither the CO, nor his address was

[1] However, as noted in Findings of Fact (FF) 14 below, there was a subsequent Fourth Amended Plan of Reorganization dated July 8, 1998.

listed (Exhibit 10, Supplemental Opposition). The record is silent as to whether the Forest Service or any department or agency filed a claim as a creditor in the bankruptcy proceeding.

14. In addition to the April 28, 1998 First Amended and Restated Asset Sale and Purchase Agreement between Hood and DS&P (Exhibit 4 to Exhibit 5 to the Supplemental Opposition), the record contains two other "Bills of Sale." One is dated July 21, 1998, and is signed by James D. Morgan, President, Hood Lumber Company. It states that for good and valuable consideration, Hood sells, assigns, transfers and delivers to QVL, a Washington corporation, all assets of the seller (Hood), including but not limited to a specified list. That list included all names used by seller, including Hanel and Hanel Lumber Company; causes of action and claims against any person or entity, other than those released under the seller's Fourth Amended Plan of Reorganization; and all claims of Hood against any affiliate arising under Chapter 5 of Title 11 of the United States Code. It also stated that notwithstanding the foregoing, Hood did not sell, assign, transfer or deliver certain listed excluded assets, including the names Morgan Company and Hood Lumber Company; any trade fixtures or improvements on or associated with the real property known as the truck shop and the Old Simpson Plywood Mill; and prepaid accounts and log deposits. The excluded list did not mention claims against Bugaboo. It contains a recitation that all terms and provisions of Section 6.14 of the First Amended and Restated Asset Sale and Purchase Agreement dated April 24, 1998, by and between Hood and DS&P are incorporated therein by reference (Exhibit 6 to the Supplemental Opposition).

15. The second additional Bill of Sale is also signed by James D. Morgan as president of Hood. It, however, is undated and states that effective as of July 24, 1998, Hood thereby sells and conveys all its right, title and interest under Enola Timber Sale Contract No. 077378, including but not limited to the contract between Hood's predecessor in interest, Hanel Lumber Company and the Forest Service to QVL, a Washington corporation. The consideration for the transfer is recited as the First Amended and Restated Asset Sale and Purchase Agreement between Hood and DS&P and "DS&P's assignment of its rights therein to QVL" (Exhibit 6 to Government's Response to the Supplemental Opposition of Appellant Hood Lumber Company).

16. On June 30, 1998 Appellant filed its Complaint in the name of Hood Lumber Company, formerly Hanel Lumber Company, Inc. In September, twice in October, and in December 1998 Appellant corresponded with the Board as Hood Lumber Company (formerly Hanel Lumber Company, Inc.) or as Hood Lumber Company.

17. On January 20, 1999, the Board received the Government's Motion to Dismiss for Lack of Jurisdiction and Memorandum in Support Thereof. The Government asserted that the question presented is whether the CO's decision has been appealed by the authorized representative of the contractor. Relying on the facts that the claim, decision and appeal indicated that Hanel was owned by Bugaboo; Bugaboo had filed a petition in bankruptcy under Chapter 11 on August 11, 1997, which was converted to a Chapter 7 on December 12, 1997; and that the Chapter 7 Trustee is not a party to the appeal, the Government argued that authority to pursue the appeal on behalf of Bugaboo was lacking.

18. Appellant filed its Opposition of Appellant Hood Lumber Company to the Government's Motion to Dismiss for Lack of Jurisdiction March 4, 1999. Appellant stated that Hanel had been purchased by TMC which was later merged into Hood, and that the reference in the Notice of Appeal to being owned by Bugaboo "was merely an oversight as the undersigned attorney was not aware of the ownership change." Appellant contends that as Hanel was the original bidder, was awarded the contract, and filed the claim, appeal and Complaint, the Motion to Dismiss should fail. Further, Appellant stated that effective July 24, 1998, Hood sold and conveyed all right, title and interest under the Enola Timber Sale contract between Hood's predecessor in interest, Hanel and the Forest Service to QVL. Therefore, Appellant asserted, QVL "as the owner of Hood Lumber Company's claim, through its predecessor Hanel Lumber Company, against the Forest Service on the Enola timber sale contract can proceed with this Appeal as the authorized entity." Appellant cites the CDA definition of the term "contractor," a party to a Government contract other than the Government and argues that as long as Hanel was identified as the claimant filing the claim, appeal and Complaint, the ownership of its stock was not a bar to the action.

19. The Government's Response to Appellant's Opposition to Motion to Dismiss was filed March 18, 1999. The Government contended that Appellant's Opposition raised the question of the "who is the Appellant." If Hood assigned its interest in the Enola contract to QVL, the Government asserted, Hood is no longer the proper party to pursue the appeal. The Government also pointed out contract provision B8.4 providing that any assumption of rights under the contract is ineffective as to the Forest Service in the absence of written approval. Respondent also cited 36 C.F.R. § 223.114 which contains restrictions on acquisitions of rights to timber sales contracts by third parties. Lastly, Respondent relies on the Anti-Assignment Act, 41 U.S.C. § 15(a), which prohibits the transfer of a contract or order, or the interest therein by the party to whom the contract or order is given to any other party, and further provides that the transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned.

20. On April 9, 1999, Appellant filed the Supplemental Opposition to the Government's Motion to Dismiss for Lack of Jurisdiction along with 11 exhibits. This document and its exhibits have been quoted from extensively in earlier findings of fact. This submission provided the Board with facts not previously contained in the record. Aside from the factual recitations, Appellant moved to have QVL substituted as Appellant and argued that the Government erred in relying on the Anti-Assignment Act for two reasons. Appellant avers that the Government had recognized the sale of assets by Hood to QVL, thereby waiving any rights under the Anti-Assignment Act. Secondly, Appellant argues that the Government is barred by the doctrine of res judicata because it was a creditor/interested party in the bankruptcy proceedings "in which QVL was sold the Enola contract or claim by Hood" and thus is bound by the confirmed plan. Appellant contends that because the Forest Service received notice of the plan and therefore had the opportunity to reject or accept the plan, it is bound by it. Appellant cited 11 U.S.C. § 1141[2] to argue that the confirmation of the final plan overrides and supercedes the Anti-Assignment Act and the Assignment of Claims Act since the

[2] Section 1141 provides that the provisions of a confirmed plan binds any creditor, equity security holder or general partner regardless of impairment or acceptance of the plan.

United States can waive the limitations of both acts where the assignment amounts to a novation or the responsible Government officials have knowledge of the assignment, the Government assents to the assignment and the Government's approval or the effect of the Government's approval occurs. Appellant then argues that the confirmation of the plan on July 10, 1998, constituted an approval by the Government of the sale of the Enola contract to QVL no later than that date, amounting to res judicata.

21. In the Government's Response to the Supplemental Opposition of Appellant filed with the Board on May 10, 1999, the Government renewed its Motion to Dismiss for Lack of Jurisdiction on two grounds. The first ground was that there was no certified claim on behalf of Appellant because the only certified claim presented to the CO was from Hanel, owned by Bugaboo. The second reason asserted was that "the attempt to transfer the claim without the consent of the Contracting Officer avoided the claim." The Government responded to Appellant's assertion that the bankruptcy filings constituted notice to, and consent by, the Government of an assignment by contending that the bankruptcy records fail to refer to the Enola Timber Sale at all.

22. On May 27, 1999, Appellant filed its Reply to the Government's Response to the Supplemental Opposition of Hood Lumber Company, Affidavit of James D. Morgan and Affidavit of Gregory J. Miner. Appellant argues that neither the lack of a certified claim nor the Anti-Assignment Act creates a jurisdictional bar to Appellant's claim. Without conceding the possibility of jurisdictional bar, Appellant argues that the Government waived any right to object to the assignment because it failed to object to the final confirmed plan filed in bankruptcy. Regarding the first issue, certification, Appellant points to the language in the CDA, 41 U.S.C. § 605(c) (6), that a defect in certification shall not deprive a court or agency board of contract appeals of jurisdiction. Appellant continued to assert that the use of the name Bugaboo was inadvertent and also asserts that the Government suffered no prejudice as a result thereof. As to the assignment issue, Appellant contends that it is not a jurisdictional question and that it did not violate the Anti-Assignment Act.

## DISCUSSION

This appeal arises under the CDA, 41 U.S.C. §§ 601-613. It is currently before the Board for ruling on the Government's Motion to Dismiss for Lack of Jurisdiction and Appellant's motion to have QVL substituted for Hood as the Appellant.

Who is the proper party to appeal hinges on the analysis of convoluted facts. The parties have presented their arguments in serial submissions which have been described in some detail in the foregoing findings of fact. In brief summary, the Government has moved to dismiss on the successive grounds that the Trustee in Bankruptcy of Bugaboo Timber Company is not a party (FF 17); the proper party to appeal is unknown (FF 19); there is no certified claim by any entity other than "Hanel Lumber Company, owned by Bugaboo Timber Company" (FF 21); and the claim was "avoided" by an attempted transfer without the consent of the Government (FF 21). Appellant contends reference in the appeal to Hanel's being owned by Bugaboo was erroneous and inadvertent and should not be grounds for dismissal (FF 18); Hanel was the original bidder, was awarded the

contact and had filed the claim (FF 18); and, QVL as owner of Hood's claim through its predecessor Hanel can proceed with the appeal as an authorized entity (FF 18).

Appellant moves to have QVL substituted as Appellant, arguing that the Government had agreed to the purchase of assets by QVL and should have known from bankruptcy proceedings that QVL was the proper owner of the claim (FF 20). Appellant also argues that the confirmation of Hood's plan of reorganization by the Bankruptcy Court acts as res judicata to prevent the Government from objecting to QVL pursuing this appeal as Appellant (FF 20).

**Bugaboo Trustee as a Necessary Party to the Appeal**

This Board has held that a harmonious reading of the CDA and the Bankruptcy Act, 11 U.S.C. § 323, leads to the conclusion that either the contractor or the trustee in bankruptcy may appeal an adverse decision of a CO under the CDA. Raymond R. Lyons, Jr., AGBCA No. 90-136-3, 90-3 BCA ¶23,046. Despite Appellant's repeated representations that Bugaboo owned Hanel (FF 5, 7, 11), that was apparently not the case (FF 4, 5). Except for those representations, there is no evidence that Bugaboo's trustee in bankruptcy had any stake in the Enola Timber Sale contract which would give him an interest in what party prosecutes this appeal.

**Certification**

The Government correctly notes that the only certification in the record was by James D. Morgan, President, "Hanel Lumber Co., Inc., Bugaboo Timber Company." Appellant correctly responds that the CDA, as amended, 41 U.S.C. § 605(c)(b), provides that a defect in certification is not a jurisdictional bar and can be cured after docketing. The CDA, 41 U.S.C. § 605(c)(1), requires certification of a claim of more than $100,000 by a certifier duly authorized to certify the claim on behalf of the contractor. The claim which is the subject of this appeal was so certified. The Act contains no requirement for subsequent certifications. The Government has presented no authority for requiring a new certification by Hood and the Board has found none. Because the certification is adequate, the Board denies the Government's motion to dismiss for the reason of lack of a certified claim.

**Appellant's Identity**

Identification of the Appellant is an issue which, indeed, has been complicated by the tangled corporate transactions. Award was made to Hanel Lumber Company on September 8, 1995 (FF 1). From the record before us, it appears that TMC had purchased Hanel's stock days earlier on August 29, 1995 (FF 3). Effective August 8, 1997, Hanel was merged into TMC and TMC's name changed to Hood Lumber Company. Under Oregon law, when a merger takes effect, every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases. Or. Rev. Stat. § 60.497. Effective, August 8, 1997, Hanel no longer had a separate corporate existence. Hood's bankruptcy proceedings commenced August 11, 1997 (FF 8).

While the CO had been sent a letter in 1996 informing him of the 1995 purchase of Hanel by TMC (FF 4), there is no evidence that the CO was informed of the merger. The content of the December 18, 1997 final decision indicates that he had not been so notified (FF 10). Although Hanel had ceased its corporate existence and Bugaboo had apparently never had an interest in the Enola Timber Sale contract or in Hanel, on March 16, 1998, this appeal was filed in Hanel's name as owned by Bugaboo. On April 27, 1998, Appellant requested that the style of the appeal be changed to Hood Lumber Company, formerly Hanel Lumber Co., Inc. (FF 11).

As of April 28, 1998, Hood entered into a Stock Sale and Purchase Agreement with DS&P to sell what was generally described as "substantially all" of Hood's assets but which was limited by a list of excluded assets (FF 12). The Enola Timber Sale contract was not specifically listed. The record also contains two Bills of Sale. One is dated July 21, 1998, and states that Hood conveys to QVL essentially the same "included" assets as conveyed to DS&P (FF 14). The other is undated but recites that as of July 24, 1998, Hood conveys to QVL all its rights, title, and interest under the Enola Timber Sale contract (FF 15). Both Bills of Sale refer to the Stock Sale and Purchase Agreement and the undated one also cites an assignment between DS&P and QVL. That assignment is not in the record. Concurrent with many of these corporate transactions, the claim and appeal process was ongoing in the various names of Hanel, Bugaboo, and Hood. The record contains no indication that the CO was made aware of or asked to ratify any of them after the initial belated notification of the change in ownership from its previous shareholders to TMC in the1995-1996 time frame.

Determining which, if any, of these entities is the proper Appellant is more than an empty exercise. Our jurisdiction to consider this appeal derives from the CDA which is applicable only to contracts entered into by an executive agency. 41 U.S.C. § 602. The contract here in question was entered into between the Forest Service, represented by CO, and Hanel Lumber Company, Inc. Without question, at award these two were the executive agency and the contractor, the term contractor being defined in the statute as a party to a Government contract other than the Government. 41 U.S.C. § 601(4). Subsequent transfers must be examined to determine whether they conveyed rights of succession under the CDA.

**Anti-Assignment Act/Assignment of Claims Act**

The Anti-Assignment Act prohibits the transfer of contracts from a Government contractor "to any other party," and such transfer "shall cause the annulment of the contract . . . transferred, so far as the United States are concerned." 41 U.S.C. § 15. This provision is designed, inter alia, to prevent fraud and multiple claims against the Government and to insure that the Government is dealing with an entity that has the legal right to perform, and against whom the United States has recourse. The Anti-Assignment Act establishes that the Government has the right to contract with whom it wishes and to know with whom it is contracting. NGV Investment & Development, Inc. v. United States, 33 Fed. Cl. 459 (1995). The Assignment of Claims Act, 31 U.S.C. § 203, is often linked with the Anti-Assignment Act in legal analysis. The Anti-Assignment Act has been referred to as a statutory prohibition against the assignment of contracts while the Assignment of Claims Act prohibits assignment of claims other than to banks, trust companies, or other financing institutions. The

conceptual difference between the statutes is that 31 U.S.C. § 203, pertains to claims for work already done and 41 U.S.C. § 15 involves executory contracts. Furthermore, 41 U.S.C. § 15 expressly provides that an attempted assignment "shall cause annulment of the contract or order transferred"; 31 U.S.C. § 203 states that an attempted assignment of a claim shall be "absolutely null and void." Tuftco Corp. v. United States, 222 Ct. Cl. 277, 284, fn. 4 (1980).

There are exceptions to assignments under both statutes. The Supreme Court has recognized certain exceptions to the prohibition where the assignment involves interests passing to heirs/devisees, assignees in bankruptcy, and receivers. Regarding assignees in bankruptcy, the Supreme Court has permitted voluntary assignments of all of the assets of an insolvent debtor for the benefit of creditors. Goodman v. Niblack, 102 U.S. 556 (1880). The Court extended the exception to mergers and consolidations where the assignor ceased to exist. Seaboard Air Line Railway v. United States, 256 U.S. 655 (1921). The Court of Claims recognized the right of a receiver to sue in that court, notwithstanding the anti-assignment statute. Redfield v. United States, 27 Ct. Cl. 393 (1892), citing Goodman v. Niblack. That court, however, expressly limited the application of the Goodman exception to include only "general" receivers--those who had been appointed receiver of all the assets of the original claimant and not merely a portion of those assets sufficient only to satisfy the claims of an individual creditor to the exclusion of other creditors. George Howes & Co. v. United States, 24 Ct. Cl. 170 (1899). The Court of Claims has also held that claims of "limited" receivers acting on behalf of single creditors and attempting to attach or collect sums due to the debtor from the Government is the type situation the anti-assignment statute was aimed at. E. Harold Patterson v. United States, 173 Ct. Cl. 819 (1965).

**The Various Transfers at Issue**

Hanel Stock Purchased by The Morgan Company

Hanel shareholders sold stock in Hanel to TMC (FF 3). This transaction is not considered an assignment. Thompson v. Commissioner of Internal Revenue, 205 F.2d 73 (3rd Cir. 1953) (In case of sale of stock prior to dissolution, there is no assignment). The sale was merely a sale of the shares of the corporation from several different shareholders to a single shareholder. Hanel's identity as a corporate entity remained unchanged. The contract was executory at this time.

Hanel Merged into The Morgan Company

TMC merged its several subsidiaries into TMC. Hanel's merger into TMC is not affected by the Anti-Assignment Act.

The Morgan Company Name Change to Hood Lumber Company

TMC changed its name to Hood. A mere name change is a transfer by operation of law and exempt from the application of the Act. United International Investigative Services v. United States, 26 Cl. Ct. 892 (1992), citing Tuftco.

**Hood Bankruptcy and Actions as Debtor in Possession**

Hood filed a voluntary petition in bankruptcy on August 11, 1997, after the completion of the sale. Thereafter Hood, as debtor in possession, conducted business on behalf of the bankrupt. Hood, as debtor in possession, was authorized to act as the contractor. The anti-assignment acts do not insulate the Government from the debtor in possession assuming the contract for purpose of prosecuting appeals. Raymond R. Lyons, Jr.; Antenna Products Corp., ASBCA No. 34134, 88-3 BCA ¶ 21,060, aff'd on recon., 89-1 BCA ¶ 21,336.

**Hood's Sale to DS&P**

As debtor in possession, Hood entered into an Asset Purchase Agreement to sell substantially all of Hood's assets to DS&P. The Asset Purchase Agreement recited that substantially all assets were sold to DS&P, but in fact, the agreement contained lists of both included and excluded assets. The Enola Timber Sale contract was enumerated on neither list. Thus, the Board cannot conclude whether Hood intended to convey the Enola contract to DS&P. It is not necessary that we do so.

It is well settled that a voluntary assignment of all the assets of an insolvent debtor for the benefit of the creditors is exempt from the prohibition of the Acts. Goodman v. Niblack. The question here is whether the sale to DS&P constitutes such a sale.

Hood does not seek to substitute DS&P as the Appellant here. Rather, Hood seeks to substitute QVL, an entity to which Hood allegedly sold the Enola contract on two different dates after it had conveyed title to "substantially all" of its assets to DS&P. The "transfers" to both DS&P and QVL need to be examined to determine whether either or both constitute transfers exempt from the Act sufficient to allow another party to assume the role of the contractor before this Board in the subject appeal.

We must decide whether an assignment exempt under the Act was properly executed. To come within the bankruptcy or receivership exemption, the sale must have been a sale of all the assets and be for the benefit of all the creditors. George Howes & Co. v. United States, and E. Harold Patterson v. United States. The record does not support our reaching that conclusion. The Asset Purchase Agreement specifically excluded at least two pieces of real estate, two names, some pre-paid accounts and claims against Bugaboo from the list of assets sold. Those exclusions are more than adequate to support the conclusion that the sale conveyed less than all of Hood's assets. Having made that determination, it is not necessary that we also decide whether the sale was for the benefit

of all the creditors.[3] The attempted transfer of the Enola contract to DS&P does not conform to the bankruptcy exception and therefore is prohibited by the Assignment of Claims Act.

**Hood's Sales to QVL**

The record contains two bills of sale purporting to transfer property to QVL, one for the same property attempted to be conveyed to DS&P (FF 14). The other specifically referenced the Enola contract (FF 15). Insofar as they pertain to the Enola Timber Sale contract, these are subject to the same defects as the attempted transfer of property to DS&P. They too are barred by the Assignment of Claims Act. Further, the record does not support the assertion that the Bankruptcy Court was aware of or approved any such transfer of assets.

**Effect of Attempted Prohibited Assignment**

As noted above, because the Enola Timber Sale contract is fully executed, the applicable statute here is 31 U.S.C. § 203, the Assignment of Claims Act, which states that an attempted transfer of a claim shall be "absolutely null and void." When an attempted assignment of a claim against the United States does not comport with applicable statutory requirements, it is void as against the government. United States v. Gillis, 95 U.S. 407, 24 L. Ed. 503 (1877); Kingsbury v. United States, 215 Ct. Cl. 136, 141, 563 F.2d 1019, 1022 (1977). The cause of action, in such cases, remains with the entity that sought unsuccessfully to assign the claim. See, e.g., Colonial Navigation Company v. United States, 149 Ct. Cl. 242, 247, 181 F. Supp. 237, 240 (1960) ("An attempted assignment of a claim against the U.S. does not forfeit the claim. It leaves the claim where it was before the purported assignment.") The appeal is therefore properly docketed in the name of Hood.

[3] Having found that the Asset Sale and Purchase Agreement does not fit the bankruptcy/receivership exemption, it is unnecessary for us to analyze Appellant's argument that the Government failed to object to the Plan and is therefor bound by it.

**RULING**

The Government's Motion to Dismiss is denied. Appellant's motion to substitute QVL as the appellant is also denied.

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**ANNE W. WESTBROOK**
Administrative Judge

**Concurring:**

_____
**EDWARD HOURY**
Administrative Judge

_____
**JOSEPH A. VERGILIO**
Administrative Judge

**Issued at Washington, D.C.**
**September 2, 1999**