



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-174314

August 28, 1973

The Honorable
The Secretary of the Army

Dear Mr. Secretary:

We refer to correspondence from the attorneys for Baldwin-Lira-Hamilton Corporation (BLH), requesting our opinion as to whether the Nashville District Engineer and the Kansas City District Engineer, United States Army Corps of Engineers, may, as representatives of the Government, legally enter into novation agreements with BLH and the Allis-Chalmers Corporation (AC). The matter was the subject of a report dated January 31, 1973, from the General Counsel, Office of the Chief of Engineers.

BLH was awarded contract No. DAC41-68-C-0131 on April 15, 1968, by the District Engineer, Kansas City District, Corps of Engineers, Kansas City, Missouri. The contract required the design, manufacture, and delivery of six 42,400-hp. hydraulic blast-type pump turbines and other miscellaneous items and services for the Truman Dam and Reservoir Project (formerly the Keysinger Bluff Reservoir Project). Upon receipt of the contract award, BLH proceeded with performance.

BLH was also awarded contract No. DAC462-70-C-0012 on August 18, 1969, by the Nashville District, Corps of Engineers, Nashville, Tennessee. The contract required the design, manufacture, and delivery of one 93,000-hp. hydraulic turbine and other miscellaneous items and services for the Laurel Project. The supplies and services to be provided under the contract were divided into two schedules. Upon award of the contract, only schedule I was released for performance and BLH proceeded to perform in accordance therewith.

BLH is a wholly owned subsidiary of Armour and Company and on July 6, 1971, Armour and Company publicly announced that it was closing its Baldwin-Lira-Hamilton Industrial Equipment plant at Edystone, Pennsylvania. The plant closing effectively took place on April 30, 1972, at which time all manufacturing operations ceased.

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PUBLISHED DECISION
53 Comp. Gen.

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Between the date of announcement of the closing and the effective date of such closing, BHI sold all of its Industrial Equipment Division's real estate, machinery and product lines. The BHI hydraulic turbine and valve product line was sold on October 20, 1971, to an Austrian corporation. The assets included in this particular sales agreement did not include any backlog work or work-in-process. BHI retained responsibility for completion of performance of all contracts in backlog and for all executed contracts still in warranty. Both contracts mentioned above were among those in BHI's backlog which required completion of performance.

As of the effective date of the plant closing, BHI had substantially completed performance under contract -0131. Schedule I of contract -0012 had been completed and notice to proceed with schedule II had been received. (In this connection, see B-174314, April 6, 1972.) To assure continuity of performance after the plant closing, BHI subcontracted its complete scope of performance obligations (except for design responsibility under -0131) and the assumption of all terms, conditions, obligations and liabilities of BHI under these contracts to AC. BHI transferred to AC all of its special assets that in any way pertained to the performance of the above contracts and not already possessed by AC.

A novation agreement among BHI, AC and the United States Government, in accordance with the provisions of section XVI, part 4, of the Armed Services Procurement Regulation (ASPR) is the desire of both BHI and AC. Reportedly, on August 24, 1972, Colonel W. R. Woodham of the Kansas City District, Corps of Engineers, advised BHI by telephone that the District had decided that there were sufficient advantages to the Government to warrant requesting our Office to render a decision with respect to the legality of entering into such a novation agreement.

BHI contends that the proposed novation agreement will be to the Government's advantage for several reasons, among which are the following: AC is a highly qualified contractor and the only remaining producer of hydraulic turbines in the United States; the Government could have direct contact with the contractor performing the work; BHI's parent company, which is not now responsible for performance of the contract, would be willing to act as guarantor under the novation agreement; and certain of the warranty rights which will expire prior to completion of the projects would be extended. Furthermore, BHI argues that the novation agreement may be legally consummated, notwithstanding the provisions of the Anti-Assignment Act, 41 U.S.C. 15, because (1) its award of subcontracts to AC was an involuntary assignment and, therefore, not prohibited, citing several court cases, and (2) ASPR 25-402(a) provides that the Government may recognize a third party as the successor in interest to a Government contract where the third party's interest is incidental to the transfer of "* * * all that part of the contractor's assets involved in the performance of the contract."

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It is the Corps' position that the proposed novation agreement would be contrary to the Anti-Assignment Act notwithstanding the exception provided in the cited regulation because AC's interest in the contracts would not be incidental to transfer of " * * * all that part of the contractor's assets involved in the performance of the contract." In this connection, it is pointed out that the bulk of the assets of the product lines was sold to the Austrian corporation and not to AC. However, we understand that the Corps is not otherwise opposed to a novation and, in fact, recognizes that it would be advantageous to the Government in certain respects. We agree with the Corps' position.

The Anti-Assignment Act, with certain exceptions, declares void the assignment by a contractor of an interest in a contract so far as the United States is concerned. However, in 32 Comp. Gen. 227, 228 (1952), we stated that--

"While section 3737, Revised Statutes [the Anti-Assignment Act] prohibits the transfer of contracts with the United States, it has been held that this section is intended for the protection of the Government which may treat a contract as annulled by an assignment or recognize the assignment as the circumstances in a particular case may warrant. * * *"

With regard to the provision in ASPR 26-400, concerning the transfer of assets, we stated in B-173331, August 19, 1971, as follows:

"The Government is generally not so much interested in what assets are transferred, or in what manner the transfer of property or interest therein is accomplished, the main concern of the agency concerned being whether the new contractor is in fact a successor in interest to the Government's contract and whether the novation agreement is consistent with the Government's interest. * * *"

Accordingly, it is our opinion that the desired novation would be in contravention of 41 U.S.C. 15. However, should it be determined that the best interests of the Government require that the novation agreement be approved, our Office would interpose no objection to such a proper exercise of administrative discretion to recognize the assignment.

Sincerely yours,

R.F.KELLER

Deputy Comptroller General
of the United States