

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Dennis Berlin, d/b/a Spectro Sort and as) ASBCA Nos. 51919, 51932, 52400
Spectro Sort Manufacturing Company)
)
Under Contract No. F04606-93-D-0458)

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON THE GOVERNMENT'S MOTION TO DISMISS

These appeals were filed in the name of "Spectro Sort Manufacturing Company," a fictitious business name under which Mr. Dennis Berlin transacts business at Arbuckle, California. The contract at issue was awarded to a contractor named "Spectro Sort" on an offer signed by Mr. Berlin as "President." Mr. Berlin represented in that offer, and in the resulting contract, that the named contractor was a California corporation. "Spectro Sort," however, is not, was not, and never has been a California corporation. It is another fictitious business name under which Mr. Berlin does business. Since Mr. Berlin, an individual, is the real party in interest and since his various fictitious business names have no legal existence apart from him as an individual, we substitute him, as styled in the caption above, for the original named appellant.

Mr. Berlin performed work under the contract from award on 9 September 1993 until he was terminated for default on 28 September 1998. All formal contract documentation (modifications, delivery orders, DD Form 250's, payment vouchers) and most letters between the parties named "Spectro Sort" as the contractor. However, some letters from the contractor to the Government were on "Spectro Sort, Inc." letterhead, and some letters from the Government to the contractor were similarly addressed. (R4, tabs 8, 9, 11, 15, 17) Mr. Berlin alleges that at a post-award meeting in January 1994, and again in February 1996, he told the contracting officer that "I . . . was doing business

as Spectro Sort and that I was the contracting party and that there was no corporation involved” (App. Counter Reply ex. D). The contracting officer denies that any such disclosures were made (Resp. Reply to App. Counter-Reply, ex. 17).

After the appeals were filed, Government trial counsel discovered that “Spectro Sort” was not a corporation. Government counsel further discovered that there had at one time been a California corporation named “Spectro Sort, Inc.” with Mr. Dennis Berlin listed on the records of the Secretary of State as “Chief Executive Officer” (Motion, ex. 3). Spectro Sort, Inc.’s corporate powers, however, were suspended on 1 August 1988 for failure to pay franchise taxes, and have remained suspended since that time (Motion, exs. 4-8). On 4 February 2000, the Government notified Spectro Sort that it considered the contract void, and it now moves to dismiss the appeals for lack of jurisdiction. On 10 March 2000, Mr. Berlin completed the state law filing and publication requirements for his use of the fictitious business name “Spectro Sort” (App. Response to Motion to Dismiss, ex. B).

The Government’s first argument is that appellant lacks standing due to “lack of legal existence and corresponding lack of a contract with the Government” (Resp. Reply to App. Counter-Reply at 4). We disagree. The appellant in this case, Mr. Berlin, an individual with an undisputed legal existence, misrepresented himself as a corporation in his bid and in the resulting contract. A misrepresentation of identity by one party to a contract does not prevent the formation of a contract unless it affects the “very nature” or the “character or essential terms” of the proposed contract. *Restatement (Second) of Contracts* § 163 and *Comment a* (1981). The nature, character and essential terms of the contract at issue were the production and delivery of specified power supplies at the specified time and price. The identity of the contractor as either an individual, corporation, or other type of business organization, did not affect the nature, character or essential terms of this contract.

Although Mr. Berlin had not complied with the state filing and publication requirements for his use of the fictitious business name “Spectro Sort” when he bid on and was awarded the contract, his failure to do so did not deprive him of his capacity to contract in that name under applicable state law. It deprived him only of the capacity to sue in state court on the contract or other transactions in that name until the filing and publication requirements were met. *Cal. Bus. & Prof. Code* § 17918 (West 2000). To the extent he lacked capacity to bring these appeals until the state filing and publication requirements were met, that incapacity was cured on 10 March 2000.

Easterbrook/Ramco, ASBCA Nos. 42176, 45288, 45289, 94-2 BCA ¶ 26,658, and *Micro Tool Engineering, Inc.*, ASBCA Nos. 31136, 31350, 86-1 BCA ¶ 18,680 are not inconsistent with our holding here. The contracts in both of those cases were awarded to named corporations -- “Easterbrook/Ramco Corp.” and “Micro Tool Engineering, Inc.” respectively. See 94-2 BCA at 132,626, and 86-1 BCA at 93,928. In neither case did

we find the real party in interest to be an individual doing business under a fictitious business name. Moreover, in *Easterbrook*, the dismissal was without prejudice since the contractor/appellant could still revive its corporate powers and standing to sue by paying the back-due taxes. *See* 94-2 BCA at 132,629. In *Micro Tool*, the dismissal was with prejudice, but only because the period for corporate reinstatement had “long since expired.” *See* 86-1 BCA at 93,930.

The Government’s second argument is that “California law gives the Government the right to void the contract.” This argument is also without merit. First, Federal Government contracts are normally governed by a uniform Federal contract law, and not by the contract laws of the particular states where they are made or performed. *Keydata Corporation v. United States*, 504 F.2d 1115, 1123 (Ct. Cl. 1974); *Padbloc Company v. United States*, 161 Ct. Cl. 369, 377 (1963). While Federal contract law may look to the law of a party’s domicile to determine the party’s capacity to contract or litigate, it follows the general principles of common law set forth in the *Restatement (Second) of Contracts* to determine whether a contract is voidable for misrepresentation. *Morris v. United States*, 33 Fed. Cl. 733, 744-47 (1995).

One of the conditions in the *Restatement* for the contract at issue to be voidable by the Government is that the misrepresentation must have “substantially contributed” to the decision to award the contract to Spectro Sort. *Restatement (Second) of Contracts* §§ 164(1), 167. The affidavits and other documentary evidence before us on the motion do not establish that the misrepresentation of Spectro Sort as a corporation was a substantial factor in determining the offeror’s responsibility, or otherwise substantially contributed to the decision to award it the contract.

The motion to dismiss is denied. Further evidence on the voidability of the contract, however, may be presented at the hearing on the merits, and the motion may be renewed at the conclusion of the hearing if warranted.

Dated: 10 August 2000

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 51919, 51932, 52400, Appeals of Dennis Berlin, d/b/a Spectro Sort and as Spectro Sort Manufacturing Company, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals