

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
FFR-Bauelemente + Bausanierung GmbH) ASBCA No. 52152
by Administrator in Bankruptcy)
)
Under Contract No. DACA90-98-C-0039)

APPEARANCE FOR THE APPELLANT: Paul D. Reinsdorf, Esq.
Reinsdorf & Associates
Frankfurt/Main, Germany

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Paul O. Cheverie, Esq.
District Counsel
Katherine D. Denzel, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Europe

OPINION BY ADMINISTRATIVE JUDGE REED
ON GOVERNMENT MOTION TO DISMISS

The government asks the Board to dismiss the appeal with prejudice on the grounds that appellant “lacks standing to pursue the claim.” The government asserts that “Appellant filing the Notice of Appeal is not a contractor in privity with the Government . . . due to the effect of the [contractor’s] bankruptcy,” that the appeal is barred by anti-assignment statutes, and that the contractor/appellant that filed the original appeal, which was earlier dismissed without prejudice pursuant to Board Rule 30, is now time-barred from reinstating the appeal. (Mot. at 1) Appellant opposes the motion. The government replied to appellant’s opposition and appellant provided a response.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 9 September 1998, a contracting officer (CO) awarded Contract No. DACA90-98-C-0039 (the contract) to FFR-Bauelemente + Bausanierung GmbH (FFR, the contractor, or appellant) on behalf of the U.S. Army Engineer District, Europe (the government). The contract was for construction and includes, among others, the standard provisions found at FAR 52.233-1 DISPUTES (OCT 1995) and FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984). The disputes provision, at subparagraph (a), makes the contract subject to the Contract Disputes Act of 1978, as amended, found at 41 U.S.C. §§ 601-613 (the CDA). Award was based on an offer signed for the contractor

by or on behalf of Norbert Noll. At award, Mr. Noll was FFR's founder, president, authorized representative and "Chief Manager" for the contract. At that time, FFR was a business enterprise organized under the laws of the Federal Republic of Germany in a manner similar to a corporation under United States law. (R4, tabs 3, 6, 13, 15, 50)

2. By CO final decision dated 28 January 1999, FFR's right to proceed under the contract was terminated for default (TFD) (R4, tabs 2, 73).

3. The contractor appealed the TFD by counsel's letter dated 16 April 1999 (R4, tab 1).

4. On or before 21 September 1999, according to a letter from counsel for appellant, "the contractor filed a bankruptcy proceeding in German court. The contractor . . . at this juncture [has] no authority to pursue the appeal." Counsel requested that the Board, pursuant to Board Rule 30, suspend adjudication of the appeal "pending the outcome of the bankruptcy proceeding." In a Decision (*Beschluss*) dated 6 October 1999, a German insolvency court (*Insolvenzgericht*) opened the bankruptcy proceedings related to FFR "due to inability to pay and over indebtedness." The court appointed Andreas F. Netzer, an attorney (*rechtsanwalt*) as the insolvency administrator (*insolvenzverwalter*).¹ The court directed, among other things, that "[t]he debtor is forbidden to avail [itself] for the duration of the insolvency proceedings of its present and future assets and this is assigned to the insolvency administrator." (Gov't mot. exs. A, F, G (Local Court Frankfurt/Main, Insolvency Court, File No. 812 IN 86/99, Decision (Oct. 6, 1999) (gov't translation))

5. By dismissal order dated 3 February 2000 (unpublished), the Board dismissed the appeal without prejudice pursuant to Rule 30 on account of the bankruptcy proceedings.

6. In a letter dated 31 January 2003, Mr. Noll "for FFR" requested that the Board reinstate the appeal. Following reinstatement of the appeal by the Board to the active docket by letter dated 3 February 2003, further correspondence from Mr. Noll dated 3 April 2003, indicated that a "bankruptcy trustee" was involved in the appeal. (Gov't mot. ex. B; Bd. corr. file)

7. In its complaint dated 4 June 2003, signed by Mr. Noll for FFR, appellant averred at ¶ 2, in pertinent part, that "FFR . . . is a business enterprise duly organized under the laws of . . . Germany. FFR . . . is now under the protection of the bankruptcy

¹ We will refer to the *insolvenzverwalter*, Mr. Netzer, as the administrator in bankruptcy based on the government's translation of the court decision and appellant's usage (finding 7, below). The appeal caption has been conformed to this usage. The term bankruptcy trustee is also used interchangeably in some correspondence.

laws of . . . Germany. Mr. Andreas F. Netzer, FFR[’s] authorized agent and the administrator in bankruptcy . . . has authorized the filing of this complaint.”

8. By statement dated 7 October 2003, the subject of which is “Bankruptcy Proceeding of FFR . . .,” Mr. Netzer, acting in his capacity as bankruptcy administrator, confirmed that Mr. Noll “is and was already in 2002 authorized to submit and prosecute lawsuits and claims of . . . FFR . . . against the US Army and Government.” “This authorization includes the hiring of attorneys” “FFR . . . or Mr Netzer nor as Bankruptcy Trustee [sic] will be liable to pay any costs, expenses, charges or fees.” Counsel for appellant reentered his appearance by letter dated 21 October 2003. (Gov’t mot. exs. D-E)

9. In a letter dated 14 May 2004, Mr. Netzer, as the administrator in bankruptcy for FFR in bankruptcy, submitted a claim under the contract. The subject matter of the claim is “the value of the performance bond . . . applied by the [government] after termination of the contract for default on 28 January 1999 to cover the [government’s] excess procurement costs.” (Gov’t mot. ex. H at 1)

DECISION

Standing

The government argues that FFR lacks standing to prosecute the appeal as “the contractor” on account of the bankruptcy proceedings. Contending correctly that the CDA defines the contractor as the party to the contract other than the government, the government apparently reaches the conclusion that FFR is no longer the contractor because it earlier professed to have no authority to pursue the appeal. The contractor, according to the government, is now the bankruptcy estate under the control of the administrator in bankruptcy. The government suggests that Mr. Noll had no authority to petition the Board for reinstatement of the appeal absent the authorization of Mr. Netzer.

The government cites Board and court decisions for the proposition that a corporation liquidated in bankruptcy is “defunct” and/or “wholly extinguished outside of the confines of the bankruptcy estate” (gov’t mot. at 5-6, 8). However, no showing has been made that FFR has been liquidated in bankruptcy. Further, the cases cited rely on bankruptcy law in the United States, not Germany. No exposition of German bankruptcy law has been provided. *See, e.g., S.A.F.E. Export Corp.*, ASBCA No. 29333, 85-3 BCA ¶ 18,404 at 92,322-23 and cases cited, *aff’d*, 803 F.2d 696 (Fed. Cir. 1986). *See also Merck & Co. v. U.S. International Trade Commission*, 774 F.2d 483, 488 (Fed. Cir. 1985) (to the extent that foreign law is relevant, evidence or briefs on the question are required since in the federal courts foreign law is a question of law to be determined by expert evidence or other relevant source).

Based on the pleadings² and the record compiled to date, it appears that the bankruptcy proceedings are ongoing with Mr. Netzer authorized to administer the present and future assets of the contractor in bankruptcy.³ For the purposes of the motion and absent any contrary indication by the German bankruptcy court or citation to other authority, we conclude that Mr. Netzer's powers as the administrator in bankruptcy would include the ability to defend against the government's claim of default with a view toward having the default termination converted to one for the convenience of the government, in accordance with FAR 52.249-10(c), thereby creating potential future assets for FFR in bankruptcy (findings 1, 4, 6-8). This situation is comparable to operation of a business under the control of a bankruptcy trustee during bankruptcy proceedings in United States bankruptcy courts. *Air Repair, G.M.B.H. (Docketed as International Atlas Services)*, ASBCA No. 10288, 67-1 BCA ¶ 6115 at 28,306; *see* 11 U.S.C. § 701.⁴

There is no indication of limitations on the authority of Mr. Netzer. Being authorized to conduct FFR's business while the bankruptcy proceeds, it follows that he may authorize others to take certain actions. Mr. Netzer has confirmed that Mr. Noll was authorized, as early as 2002, to take action under the appeal (finding 8). Absent an explanation of German agency law, bankruptcy law, other persuasive legal authority, or factual discrepancy, we conclude that Mr. Noll's request to reinstate the appeal and to have the Board accept the complaint filed by him in 2003 (findings 6-7) was authorized by Mr. Netzer on behalf of FFR in bankruptcy.

² As the government notes in its reply at 2, when considering a motion to dismiss for lack of jurisdiction, we favorably construe the complaint allegations. *FloorPro, Inc.*, ASBCA No. 54143, 04-1 BCA ¶ 32,571 at 161,180, *citing Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In response to ¶ 2 of the complaint, in which appellant avers the fact of its existence (finding 7), the government professes a lack of knowledge, an insufficient challenge to require more of FFR at this stage of the proceedings.

³ The government refers to these assets as the "bankruptcy estate," a term of art under United States bankruptcy law. *See e.g.* 11 U.S.C. § 541(a) (commencement of bankruptcy "case" in United States courts "creates an estate"). We are not informed whether this is the correct terminology under German bankruptcy law but will employ the term for our present purposes to characterize the present and future assets of FFR in bankruptcy.

⁴ In its reply at 5, the government notes that the bankruptcy proceeding has been ongoing for a lengthy period and alternatively requests that we issue a show cause order related to dismissal for lack of jurisdiction. We decline that suggestion, although we expect appellant's counsel to provide the status of the bankruptcy.

The authority granted to Mr. Noll by Mr. Netzer appears to be limited in one respect. Mr. Noll may not obligate either Mr. Netzer or the bankruptcy estate to pay attorneys' fees and costs to prosecute the appeal. (Finding 8) The government has cited no legal authority for the proposition that this limitation on Mr. Noll's authority somehow obviates Mr. Noll's authority otherwise, to the extent granted by Mr. Netzer, to petition the Board to reinstate the appeal and to submit the complaint in the appeal on behalf of FFR in bankruptcy. The government has not shown that this arrangement is prohibited by German bankruptcy law, agency law, or otherwise.

Anti-Assignment

The government notes the well-established rule that anti-assignment statutes in the United States do not prohibit the transfer of a claim against the United States when accomplished as a matter of law pursuant to a bankruptcy proceeding in United States courts. 31 U.S.C § 3727, 41 U.S.C. § 15; *Rel-Reeves, Inc. v. United States*, 221 Ct. Cl. 263, 272-79, 606 F.2d 949, 954-58 (1979); *Certified Abatement Technologies, Inc.*, ASBCA No. 39852, 99-1 BCA ¶ 30,389 at 150,201, *recons. denied*, 00-1 BCA ¶ 30,838. *See also United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 376 (1949) (claim under Federal Tort Claims Act may be brought by insurer subrogated by payment to an insured).

The German bankruptcy court decision is silent on the question of whether Mr. Netzer, as the administrator in bankruptcy, is authorized by the court to pursue claims on behalf of the bankruptcy estate. However, the court's decision clearly made Mr. Netzer responsible for the "present and future assets" of FFR in bankruptcy (finding 4).

It follows, asserts the government, that rights in the contract were transferred to Mr. Netzer as the administrator in bankruptcy by operation of German law. Then, according to the government, since Mr. Noll petitioned the Board to reinstate the appeal and submitted the complaint "for FFR" (findings 6-7), instead of "for the bankruptcy estate of FFR" (gov't mot. at 7), the government surmises that Mr. Netzer may have improperly transferred the rights under the appeal back to Mr. Noll in violation of the anti-assignment statutes.

Concerning the apparent written designation of Mr. Noll as agent for Mr. Netzer as the administrator in bankruptcy (finding 8), the government again notes that FFR, not the bankruptcy estate of FFR is referenced and that the authority allowed Mr. Noll to take certain actions also prohibits the incurrence of obligations against FFR and/or Mr. Netzer as an individual or as the administrator in bankruptcy. The government characterizes the authorization as "unclear" and infers that Mr. Noll has somehow acquired or is asserting a separate right to prosecute the appeal on account of its abandonment by the bankruptcy estate. Again, we note that the government has not informed us of relevant German bankruptcy procedure, in particular, whether such procedure includes a listing of assets or

abandonment procedures comparable to that required under United States bankruptcy law (*see* 11 U.S.C. §§ 521, 554) that might serve to clarify the status of assets being marshaled by Mr. Netzer on behalf of FFR in bankruptcy.

We addressed the matter of Mr. Noll's authority above. The government has not explained and we fail to understand, at this point in development of the record, why Mr. Noll's actions would be considered unauthorized even if he has accepted the risk of being obligated to pay attorneys' fees and costs without hope of reimbursement by the bankruptcy estate. If the appeal before the Board is denied on the merits, the bankruptcy estate is in no worse financial condition. If the appeal were to be sustained, the TFD would be converted to a termination for the convenience of the government (TFC). FAR 52.249-10(c) (finding 1). It would remain to be seen how the accrual of any rights under a TFC might affect the German bankruptcy proceedings and the fortunes of FFR, as a bankrupt firm and Mr. Noll as an individual.

Concerning the government's suggestion that Mr. Netzer may have improperly transferred the rights under the appeal back to Mr. Noll in violation of the anti-assignment statutes, we see this as conjecture by the government. If further development of the record indicates otherwise, the government may again raise this point. For now, we are not convinced that a showing has been made that supports the government's argument. The Board's view is that Mr. Noll has acted as agent for Mr. Netzer. Under that construct, the government need not be concerned with defending against more than one entity. Our preliminary view is that the appellant in this case is Mr. Netzer in his capacity as administrator in bankruptcy for FFR in bankruptcy, under the direction of the German court as guided by German bankruptcy law and procedure.

Time Bar

The government suggests that Mr. Noll was not authorized to petition the Board to reinstate the appeal and that FFR, being defunct in bankruptcy, has no capability to petition the Board to reinstate the appeal. Therefore, the argument goes, the time to reinstate the appeal based on the Board Rule 30 dismissal dated 3 February 2000 (finding 5), has passed without timely and proper action to reinstate the appeal and the appeal must be dismissed with prejudice by operation of Board Rule 30. The factual and legal underpinnings for this contention are absent, as explained above.

New Claim

With its reply to appellant's opposition, the government provided a copy of a new claim submitted to the government by Mr. Netzer in his capacity as administrator in bankruptcy (finding 9). The government argues in the reply at 4, that this action by Mr. Netzer "begs the question that if Mr. Netzer properly delegated authority to Mr. Noll 'to prosecute lawsuits and claims of . . . FFR . . . against the U.S. Army and Government,' how can Mr. Netzer now be properly asserting a claim under the same

contract?” In effect, the government suggests that appointment by a principal, Mr. Netzer, of an agent, Mr. Noll, somehow extinguishes the authority of the principal. No authority under German law or the law of the United States is provided in support of that argument.

The government further contends that it is unreasonably burdened by having to defend against multiple parties, an apparent reference to Messrs. Noll and Netzer. We consider Mr. Noll and Mr. Netzer to be authorized representatives of FFR in bankruptcy, the sole appellant in this appeal. Therefore, we fail to see any undue burden on the government in dealing with multiple claims (but not multiple claimants) under the contract.⁵

CONCLUSION

For the reasons stated above, the government’s motion to dismiss is denied.

Dated: 2 August 2004

STEVEN L. REED
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

⁵ Of course, we presently have no authority over the merits of the new claim. We will consider it only if it is denied by the CO and appealed to the Board.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 52152, Appeal of FFR-Bauelemente + Bausanierung GmbH by Administrator in Bankruptcy, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals