

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Advanced Communications Systems) ASBCA No. 52592
)
Under Contract No. DCA200-94-H-0015)

APPEARANCE FOR THE APPELLANT: Cyrus E. Phillips, IV, Esq.
Washington, DC

APPEARANCES FOR THE GOVERNMENT: James W. DeBose, Esq.
Stephanie A. Kreis, Esq.
Trial Attorneys
Defense Information Systems
Agency
Scott Air Force Base, IL

OPINION BY ADMINISTRATIVE JUDGE FREEMAN ON
APPELLANT'S MOTION FOR CHANGE OF NAME AND
THE GOVERNMENT'S MOTION TO DISMISS

Advanced Communications Systems (ACS) moves for leave to change the name of the appellant in this appeal to "Systore Companies, Incorporated doing business as Advanced Communications Systems" (app. mot. at 1-2). The government opposes the motion and moves to dismiss the appeal for lack of jurisdiction. We grant appellant's motion and defer decision on the government's motion pending the hearing on the merits.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

1. The above captioned value added network (VAN) license agreement was entered into effective 2 March 1994 by Tomas Palubinskas for ACS on 2 March 1994, and by the contracting officer for the government on 29 March 1994 (R4, tab 1 at 7, 10).
2. Prior to entering into the agreement, the contracting officer obtained a Dun & Bradstreet (D&B) report as of 7 March 1994 on "SYSTORE COMPANIES INC + ADVANCED COMMUNICATION SYSTEMS." The D&B report stated, among other things, that the business was started in 1984 by Robert Stone, that it was incorporated in 1986 in Ohio, and that its current president was Tom Palubinskas. (App. 2d reply, attach. 1 at 1, 3, 5) On 29 March 1994, the same day the contracting officer signed the VAN license agreement, she also signed a "Contractor Responsibility" determination in which

she determined that ACS was responsible based in part on the D&B report (app. 2d reply, attach. 3).

3. In answers to interrogatories in this appeal, Mr. Stone explained the relationship between himself, Systore Companies, Inc. (hereinafter “Systore”) and ACS as follows:

Systore Companies Inc. does business as ACS – Advanced Communications Systems. There never were nor ever shall be two separate companies. Mr. Stone is the Owner of Systore Companies, Inc.

(App. mot., attach. 3 at 1-2)

4. On 16 January 1998, the 1994 agreement was terminated (R4, tab 1 at 1). On the same day, a new VAN license agreement was entered between “Systore Companies, Inc. DBA – ACS – Advanced Communications Systems” and the government. Mr. Stone signed the new agreement for Systore as CEO. (App. mot., attach. 4 at 1, 8)

5. On 17 February 1998, the corporate charter of Systore was cancelled by the Ohio Secretary of State for failure to maintain a statutory agent (app. mot., attach. 2 at 1-2).

6. On 27 March 1999, ACS submitted a certified claim to the contracting officer in the amount of \$1,832,565,543.40 for alleged breach of the 1994 agreement. The claim was signed by Mr. Stone as CEO. (R4, tab 2) By final decision dated 30 November 1999, the contracting officer denied the claim entirely (R4, tab 5 at 1, 9). On 18 January 2000, ACS appealed that decision to this Board.

7. On 10 April 2006, Systore filed for reinstatement with the Ohio Secretary of State designating Mr. Stone as statutory agent. Systore was reinstated on 13 April 2006. (App. mot., attach. 2 at 1-2)

8. By letter to counsel dated 15 March 2007, Mr. Stone stated that he was unaware until April 2006 that Systore’s charter had been cancelled (app. reply, attach. 3). Appellant has submitted Systore’s federal income tax returns for its fiscal years 1998, 1999, and 2000 in addition to Mr. Stone’s letter as evidence that he was unaware of the cancellation of Systore’s charter during those years (app. reply, attach. 4).

9. ACS does not allege, nor does the record on the motions otherwise show, that Systore ever registered the name “Advanced Communications Systems” as a trade name with, or reported it as a fictitious name to, the Secretary of State of Ohio in accordance with the Ohio Revised Code (ORC), section 1329.01.

DECISION

A. Appellant's Motion to Change Name

ACS moves to change the named appellant in this appeal to “Systore Companies, Incorporated doing business as Advanced Communications Systems” on the ground that appellant’s name “is in fact the trade name of Systore Companies Incorporated an Ohio For-Profit Corporation” (app. mot. at 1-2). The government opposes on the ground that “neither a change-of-name Agreement nor a novation was effected by the parties in accordance with the [FAR],” and because “a name change would disturb the original rights and obligations of the parties under the contract in violation of the FAR and the Anti-Assignment Act” (gov’t mot. and opp’n at 1).

It is clear from the 7 March 1994 D&B report and Mr. Stone’s answers to the interrogatories that “Advanced Communications Systems” was a business name of Systore, and it is clear from the contracting officer’s 29 March 1994 Contractor Responsibility determination that she relied in part on that D&B report in determining the responsibility of ACS. (*See* SOF ¶¶ 2 and 3) In these circumstances, the name change requested by ACS is not a novation to a new contractor, nor a change in corporate or business entity name subject to FAR Subpart 42.12. Neither does the requested name change constitute an assignment of the contract to a third party nor does it effect any change in the existing rights, obligations or relationship of the parties. The requested change retains the name “Advanced Communications Systems” and only adds to it the further identification of that name as a business name of Systore Companies, Inc. The government’s objections are without merit. Appellant’s motion is granted. The caption of this appeal will hereafter be “Systore Companies, Inc. d/b/a Advanced Communications Systems.”

B. The Government's Motion to Dismiss

The government moves to dismiss the appeal for lack of jurisdiction on the ground that neither ACS nor Systore was a contractor within the meaning of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (CDA), when the claim was submitted to the contracting officer or when the contracting officer’s decision was appealed to the Board (gov’t mot. and opp’n at 4-5). The substance of this argument is that Systore’s corporate charter had been cancelled and had not been reinstated when the claim was submitted and when the appeal from the contracting officer’s denial was filed. (*See* SOFs ¶¶ 5-7)

The Ohio Revised Code (ORC) at §§ 1701.97 and 1701.922 provides that the exercise of otherwise authorized corporate powers during a period of cancellation is valid if the charter is subsequently reinstated and if “the officer, agent, or employee had no

knowledge that the corporation's or association's articles of incorporation had been canceled." ORC Ann. §1701.922(B)(1)(b)(2007). The knowledge referred to in the quoted provision is actual and not imputed knowledge. *See Central Funding, Inc. v. CompuServe Interactive Services, Inc.*, Franklin App. No. 02AP-972, 2003 Ohio App. LEXIS 4537, at 12-18 (service of cancellation notice on statutory agent insufficient to charge officers with knowledge under the statute when they were acting without actual notice). We attach little weight to the unsworn statement of Mr. Stone in his 15 March 2007 letter to counsel that he did not know of the cancellation of Systore's charter until April 2006. (*See* SOF ¶ 8) However, it is sufficient for us to defer decision on the government's motion to hearing where Mr. Stone can be examined under oath as to when he had actual knowledge of the cancellation.

The government also argues that even if Systore's corporate powers were reinstated retroactive to the cancellation, it still was barred by ORC § 1329.10(B) from submitting the claim and filing the appeal in the name of ACS. The cited statute bars actions in unregistered fictitious names "in any court in this state." There is no evidence that Systore ever registered "Advanced Systems Communications" as a trade name with, or reported it as a fictitious name to, the Ohio Secretary of State. (*See* SOF ¶ 9) The contracting officer and this Board, however, are not a court in the state of Ohio, and the cited prohibition is inapplicable to the Systore (ACS) claim and appeal. *See AEI Pacific, Inc.*, ASBCA No. 53806, 05-1 BCA ¶ 32,859 at 162,810-11 (Alaska law); *DCO Construction, Inc.*, ASBCA Nos. 52701, 52546, 02-1 BCA ¶ 31,851 at 157,403 (Florida law).

For the reasons stated above, we defer ruling on the government's motion to dismiss pending testimony of Mr. Stone at hearing.

Dated: 12 July 2007

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 No. 52592, Appeal of Advanced Communications Systems, rendered in conformance with the Board's Charter.

Dated:

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