

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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David's Econo-Move, Inc. ) ASBCA No. 49105  
 )  
Under Contract No. DAKF40-93-D-0012 )

APPEARANCE FOR THE APPELLANT: Sam Z. Gdanski, Esq.  
Suffern, NY

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA  
Chief Trial Attorney  
CPT Joseph A. Pixley, JA  
CPT Melissa Miller, JA  
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

On 18 November 1999 the Government filed a Motion for Summary Judgment referencing both ASBCA No. 49105 (appeal of a termination for default) and ASBCA No. 49562 (appeal from an assessment of excess costs). We construe the motion as only applying to the termination for default. Although given the opportunity to do so, appellant did not file a response to the motion by the extended due date of 2 November 2000 and a request for a further 30-day extension was denied. We deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. David's Economove, Inc. was incorporated under the laws of the State of North Carolina on 22 December 1981 (mot., attach. A).
2. On 16 December 1992, the Directorate of Contracting at Fort Bragg, North Carolina (Government) awarded Contract No. DAKF40-93-D-0012 to David's Econo-Move, Inc. (appellant), apparently the same entity as David's Economove, Inc. The contract was a firm fixed-price requirements contract for local household goods delivery, packing and pickup at Ft. Bragg and surrounding areas. The contract was for a base year beginning on 1 January 1993 and four option years. (R4, tab 1)
3. FAR 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 1989) was included in the contract and said clause conferred the option to extend the contract exclusively on the Government.

4. The contract incorporated FAR 52.249.8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984)—ALTERNATE I (APR 1984), which provided in pertinent part as follows:

(a) (1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to-

(i) Pick up the commodities or to perform the services, including delivery services, within the time specified in this contract or any extension;

(ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or

(iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).

(2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

(R4, tab 1 at I-5)

5. North Carolina law provides for the administrative dissolution of a corporation in part as follows:

The Secretary of State may commence a proceeding under G.S. 55-14-21 to dissolve administratively a corporation if:

(1) The corporation does not pay within 60 days after they are due any penalties, fees, or other payments due under this Chapter;

(2) The corporation is delinquent in delivering its annual report;

(3) The corporation is without a registered agent or registered office in this State for 60 days or more;

(4) The corporation does not notify the Secretary of State within 60 days that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued;

(5) The corporation's period of duration stated in its articles of incorporation expires; or

(6) The corporation knowingly fails or refuses to answer truthfully and fully within the time prescribed in this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter.

(N. C. Gen. Stat. § 55-14-20, mot., attach. B)

6. The procedure for effecting an administrative dissolution of a North Carolina corporation is set forth in N. C. Gen. Stat. § 55-14-21, in part as follows:

(a) If the Secretary of State determines that one or more grounds exist under G.S. **55-14-20** for dissolving a corporation, he shall mail the corporation written notice of his determination.

(b) If the corporation does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not exist within 60 days after notice is mailed, the Secretary of State shall administratively dissolve the corporation by signing a certificate of dissolution that recites the ground or grounds for dissolution and its effective date. The Secretary of State shall file the original of the certificate and mail a copy to the corporation.

(Mot., attach. C, emphasis in original)

7. Under N. C. Gen. Stat. § 55-14-22, a dissolved corporation may apply for reinstatement no later than five years after the effective date of the dissolution (mot., attach. D). The effect of dissolution is set forth in N. C. Gen. Stat. § 55-14-05, in part as follows:

(a) A dissolved corporation continues its corporate existence but may not carry on any business except that

appropriate to wind up and liquidate its business and affairs, including:

(1) Collecting its assets;

(2) Disposing of its properties that will not be distributed in kind to its shareholders;

(3) Discharging or making provision for discharging its liabilities;

(4) Distributing its remaining property among its shareholders according to their interests;

(5) Doing every other act necessary to wind up and liquidate its business and affairs.

(b) Dissolution of a corporation does not:

(1) Transfer title to the corporation's property;

(2) Prevent transfer of its shares or securities, although the authorization to dissolve may provide for closing the corporation's share transfer records;

....

(5) Prevent commencement of a proceeding by or against the corporation in its corporate name;

(6) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution; or

(7) Terminate the authority of the registered agent of the corporation.

(Mot., attach. E)

8. On 11 October 1993, the contracting officer issued a 10-day cure notice based upon an allegation of sexual harassment against two employees of appellant in the course of performing work under the contract (R4, tab 11).

9. The Government exercised the first option period on 2 December 1993 (R4, tab 14).

10. On 28 January 1994, David's Economove, Inc. was administratively dissolved by the State of North Carolina for failure to file an annual report. Appellant continued to perform work under the contract. (Mot., attach. A; see R4, tabs 18-47).

11. On 25 October 1994 the contracting officer issued a 10-day cure notice based upon an alleged unacceptable level of performance including "unprofessional behavior, excessive complaints by service members, alleged consumption of alcohol between origin and destination, failure to properly pad, wrap and protect furniture, use of dirty pads and vehicles, and other infractions of the contract requirements" (R4, tab 29).

12. The Government exercised the second option period on 2 December 1994 (R4, tab 31).

13. On 7 August 1995, the contracting officer issued a 10-day cure notice to appellant stating that appellant's management solutions to serious violations of the contract had not worked and that the twenty discrepancy reports made during June 1995 were all repeat violations. Unless the problems were cured within 10 days of receipt of the letter, the contracting officer stated that she might terminate the contract for default. (R4, tab 42)

14. By letter dated 18 August 1995, appellant responded to the cure notice and on 22 August 1995, the contracting officer terminated the contract for default. At the time she terminated the contract for default, the contracting officer did not know that the contractor had been administratively dissolved. (R4, tabs 42, 43; mot., attach. F, affid. of Barbara M. Johnson)

### Discussion

Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

The Government contends that the administrative dissolution of appellant as a corporation endangered its performance under the contract because its power to perform had been removed by the State of North Carolina. The Government contends this circumstance provides an additional independent basis justifying the termination for default. As to the lack of a 10-day cure notice for this alleged basis for default termination, the Government argues the contracting officer could not issue a cure notice for a cause as to which she had no knowledge and further, appellant had actual or constructive knowledge of the dissolution and concomitant endangerment of performance and thus there is no prejudice in sustaining the termination for default on this alternative basis.

Because we believe the power to perform the contract was not removed by the State of North Carolina, summary judgment for the Government is inappropriate. North Carolina law clearly precludes a corporation's carrying on of any business except that appropriate to wind up and liquidate its business and affairs following an administrative dissolution and the Government cites several North Carolina decisions for that general proposition. *South Mecklenburg Painting Contractors, Inc. v. The Cunnane Group, Inc.*, 517 S.E.2d 167 (N.C. App. 1999); *Piedmont and Western Investment Corp. v. Carnes-Miller Gear Co., Inc.*, 96 N.C. App. 105, 384 S.E.2d 687 (1989); *Pierce Concrete, Inc. v. Cannon Realty & Construction Co., Inc.* 77 N.C. App. 411, 335 S.E.2d 30 (1985); *cf. Raleigh Swimming Pool Company v. Wake Forest Country Club*, 11 N.C. App. 715 at 716, 182 S.E.2d 273 (1971).

Here, the contract was awarded before dissolution. Apparently the Government believes the exercise of options is an act precluded by the winding up provisions of the North Carolina statute, as if the options were appellant's. In fact, the options belonged to the Government and appellant had no right to refuse to accept the exercise of the options when accomplished in accordance with FAR 52.217-9. North Carolina law allows a dissolved corporation to wind up its affairs which includes discharging its liabilities and doing every act necessary to wind up its business. Performance and completion of contract work are certainly in that category of permissible acts while winding up. Furthermore, as of 22 August 1995, appellant was within the five-year grace period for reinstatement under North Carolina law. *Cf. Micro Tool Engineering, Inc.*, ASBCA No. 31136, 31350, 86-1 BCA ¶ 18,680 (under Florida law, where 3-year period for reinstatement had expired, putative award of contract after expiration of 3-year period was a nullity and Board lacked jurisdiction). *Services, Inc.*, ASBCA No. 42929, 93-1 BCA ¶ 25,514, cited by the Government, is distinguishable. There appellant had been dissolved prior to entering into the contract, and the issue was whether the contract was void *ab initio*.

Accordingly, dissolution did not by itself form an independent basis for termination for default although it may be a relevant fact for other purposes. The Government is not entitled to judgment as a matter of law and the motion is therefore denied.

Dated: 26 April 2001

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RICHARD SHACKLEFORD  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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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. 49105, Appeal of David's Econo-Move, Inc., rendered in conformance with the Board's Charter.

Dated:

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