

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
TPS, Inc.) ASBCA No. 52421
)
Under Contract No. N62467-95-C-2739)

APPEARANCE FOR THE APPELLANT: Timothy A. Sullivan, Esq.
Starfield & Payne
Fort Washington, PA

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Richard A. Gallivan, Esq.
Assistant Director
Henry D. Karp, Esq.
Senior Trial Attorney

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

TPS, Inc. appeals the denial of its claim for differing site conditions under the captioned contract. The Government moves to dismiss on the grounds (i) that TPS is a dissolved Florida corporation and lacks capacity to maintain the appeal; and (ii) that TPS is not properly represented under Board Rule 26.

On the capacity issue, we look to the law of the state of incorporation. *Teller Environmental Systems, Inc.*, ASBCA No. 42092, 93-1 BCA ¶ 25,330; *Talasila, Inc. v. United States*, 240 F.3d 1064, 1066 (Fed. Cir. 2001). Under Florida law, a dissolved corporation continues its corporate existence “to wind up and liquidate its business and affairs.” Fla. Stat. § 607.1405(1). Dissolution does not “[p]revent commencement of a proceeding by or against the corporation in its corporate name.” Fla. Stat. § 607.1405(2)(e). The statutory prohibition against maintaining or defending actions, when delinquent in filing reports, applies only to actions “in any court of this state.” It does not apply to actions in other tribunals. Fla. Stat. § 607.1622(8)

TPS was “administratively dissolved” by the Florida Secretary of State effective 16 October 1998 for failure to file required reports. The contract at issue was awarded and performed, and the facts giving rise to the claim occurred, before the dissolution. (Gov’ t Mem., Attach. 3) This appeal from the denial of that claim is part of winding up the affairs of the corporation. Under the above-cited provisions of Florida law, TPS has legal capacity to prosecute the appeal.

On the representation issue, Board Rule 26 provides that a corporation may appear before the Board by one of its officers, or “by an attorney at law duly licensed in any state . . .” The appeal was filed on 12 October 1999, by Timothy A. Sullivan, Esq., “on behalf of TPS, Inc. and D&J Industries.” D&J was a subcontractor of TPS on the contract. It is not disputed that Mr. Sullivan is a duly licensed attorney at law in the Commonwealth of Pennsylvania.

Mr. Sullivan was retained by Mr. David Schlapper, President of D&J, to prosecute the appeal. Mr. Schlapper in turn held a notarized power of attorney, executed by the president of TPS on 5 March 1999. That power of attorney authorized him “to enter into any and all legal agreements, . . . concerning any matters of business, performance, payment or collection of money, and all other matters necessary whatsoever to conduct business on behalf of, and in the name of, TPS, Inc. with regard to contract #N62467-95-C-2739.” (Gov’ t Mem., Attach. 2) The appointment of counsel to prosecute this appeal on behalf of TPS is within the broad powers granted by the power of attorney.

To the extent the appeal involves either primarily or even exclusively a subcontractor claim, the power of attorney as exercised is nothing more than the prime contractor consenting by its authorized agent to sponsor the subcontractor’s claim. Such sponsorship has long been allowed by the Board, approved by the Federal Circuit, and is expressly permitted by regulation. *See TRW, Inc.*, ASBCA No. 11373, 66-2 BCA ¶ 5882 at 27,996; *Erickson Air Crane Company of Washington, Inc. v. United States*, 731 F.2d 810, 813 (Fed. Cir. 1984); and FAR 44.203(c).

The cases cited by the Government are not to the contrary. In *Pavement Maintenance Corporation*, ASBCA No. 29549, 85-3 BCA ¶ 18,170, there was no evidence of authorization by the appellant/prime contractor. *Id.* at 91,253. In two of the cited cases, the evidence of authorization was limited to the unsworn statements of the alleged representative. *See Carillon Corporation*, ASBCA No. 36290, 91-2 BCA ¶ 23,901 at 119,747, and *Harris Acoustics*, ASBCA No. 17207, 73-1 BCA ¶ 9838 at 45,986. In *Garrison Engineers Construction, Inc., NW Mechanical, Inc.*, ASBCA Nos. 29015, 29536, 85-1 BCA ¶ 17,731, the authorization did not extend beyond filing the notice of appeal. *Id.* at 88,514. In *Orvedahl Construction Inc.*, ASBCA No. 39648, 93-3 BCA ¶ 25,921, the issue was whether a subcontractor employee with a limited power of attorney from the prime contractor qualified as a “senior company official” for purposes of the statutory certification requirement. In TPS’ case, the claim was certified by TPS’ president, and there is a notarized power of attorney in evidence with powers sufficiently broad to cover prosecution of the appeal.

The Government argues that its ability to defend the appeal and assert “set-offs” is impaired by the fact that the designated counsel for TPS is also counsel for the subcontractor, that counsel for TPS has been unable to get discovery responses from TPS,

and that counsel for TPS has had no communication with TPS since before the filing of the appeal. These circumstances may be considered and appropriate relief granted during proceedings on the merits. Those proceedings will be governed by the rights and obligations of the parties to the prime contract. The stated circumstances do not overcome the notarized power of attorney and the undisputed exercise of that power for purposes of determining that TPS is represented in accordance with Rule 26.

The motion to dismiss is denied.

Dated: 29 March 2001

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. 52421, Appeal of TPS, Inc., rendered in conformance with the Board's Charter.

Dated:

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