

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
AEI Pacific, Inc.) ASBCA No. 53806
)
Under Contract No. DACA85-98-C-0031)

APPEARANCES FOR THE APPELLANT: Traeger Machetanz, Esq.
Christine V. Williams, Esq.
Oles Morrison Rinker & Baker LLP
Anchorage, AK

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Gregory W. Vanagel, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Alaska

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION
OR FOR AN ORDER TO SHOW CAUSE

The government moves to dismiss for lack of jurisdiction on the grounds that appellant, an involuntarily dissolved Alaska corporation, lacked capacity to sue and was not a "contractor" within the meaning of the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-13, at the time the subject appeal was filed.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 23 September 1998, the U.S. Army Corps of Engineers, Alaska District (government) awarded Contract No. DACA85-98-C-0031 in the amount of \$608,677 to appellant for the renovation of the John F. Kennedy Elementary School at Fort Richardson, Alaska (R4, tab 31 at 3, 7). Due to funding constraints, the initial scope of work consisted of the exterior site work (R4, tab 1 at 5). On 8 March 1999, the government issued Modification No. P00002, adding the renovation of the interior of the main building and increasing the contract price by \$2,968,009 (R4, tab 30). The contract completion date for both portions of the work was 15 August 1999 (R4, tab 1 at 6).

2. Work at the site commenced on 4 June 1999 (R4, tab 1 at 6). On 7 December 1999, appellant advised the government that it was "financially unable to perform" and was "irrevocably and voluntarily abandon[ing] and terminat[ing] the above construction

Contract” (R4, tab 5). On 14 January 2000, the contracting officer terminated the contract for default for non-performance and entered into a takeover agreement with appellant’s surety, the St. Paul Companies (R4, tab 27).

3. According to Mr. Joe Jaime, appellant’s president, owner and sole shareholder, appellant went out of business in January 2000 (Jaime dep. at 14).

4. On 16 February 2001, appellant submitted a request for an equitable adjustment (REA) to the contracting officer requesting \$1,245,393 for differing site conditions, defective plans and specifications, delay, loss of efficiency and acceleration (R4, tab 4). On 18 July 2001, appellant converted the REA into a claim. Mr. Jaime certified the claim. (R4, tab 3)

5. On 3 December 2001, Mr. Jaime declared personal bankruptcy (gov’t reply at tab 5).

6. On 6 May 2002, appellant was involuntarily dissolved by the State of Alaska for failure to file its biennial report and/or pay its biennial tax/fees for the period ending 31 December 2000 (gov’t mot. at tab 2; app. reply at tab 10).

7. On 20 May 2002, Oles Morrison Rinker & Baker LLP (Oles Morrison) appealed the deemed denial of the claim to this Board on appellant’s behalf.

8. On the same date, Oles Morrison filed a complaint. Paragraph 1 of the complaint stated as follows:

1. Appellant AEI Pacific, Inc. (“AEI”) is a corporation organized and existing under the laws of the State of Alaska. AEI has performed all conditions precedent to the maintenance of this action, and has the right to appeal directly from a Contracting Officer’s Decision pursuant to the above-referenced contract.

9. On 17 June 2002, the contracting officer denied the claim (R4, tab 1).

10. The government filed the answer on 17 June 2002. Paragraph 1 of the answer stated as follows:

1. The Government denies the assertion that Appellant AEI Pacific, Inc., is a corporation organized and existing under the laws of the state of Alaska. As of May 5, 2002, state records indicate AEI Pacific, Inc. was involuntarily dissolved. With regard to part one of the second assertion in paragraph one of

the Complaint, the Government admits appellant's principal, Mr. Joe Jamie, certified a claim and presented it to the Contracting Officer. With regard to part two of the second assertion in paragraph 1 of appellant's complaint, the Government admits appellant's right to appeal

11. On 9 October 2003, the government filed an amended answer. Paragraph 1 of the amended answer was identical to paragraph 1 of the original answer.

12. On 20 January 2004, the government moved to dismiss for lack of jurisdiction due to lack of capacity and failure to file a timely appeal.

13. On 30 April 2004, the State of Alaska issued a Certificate of Compliance indicating that appellant had been reinstated as an Alaska corporation (app. Notice of Good Standing of AEI Pacific, Inc., dated 3 May 2004, ex. 1).

DECISION

The government moves to dismiss for lack of jurisdiction, alleging that appellant, an involuntarily dissolved Alaska corporation, lacked capacity to sue and was not a "contractor" within the meaning of section 601(4) of the CDA. Appellant argues that the government has waived the defense of lack of capacity. In addition, appellant asserts that it has been reinstated as an Alaska corporation in good standing and that such reinstatement relates back to the date of dissolution, curing any jurisdictional defect.

In determining what powers survive dissolution, we look to the laws of the state of incorporation. *Talasila, Inc. v. United States*, 240 F.3d 1064, 1066 (Fed. Cir. 2001); *TPS, Inc.*, ASBCA No. 52421, 01-1 BCA ¶ 31,375 at 154,916; Fed. R. Civ. P. 17(b). Alaska Statute (AS) AS 10.06.678 provides, in part, as follows:

(a) A corporation that is dissolved voluntarily or involuntarily continues to exist for the purpose of winding up its affairs, defending actions against it, and enabling it to collect and discharge obligations, dispose of and convey its property, and collect and divide its assets. A dissolved corporation does not continue to exist for the purpose of continuing business except so far as necessary for winding up the business.

(b) An action or proceeding to which a corporation is a party does not abate by the dissolution of the corporation or by reason of proceedings for winding up and dissolution of the corporation. A corporation that is dissolved voluntarily or

involuntarily may not commence a court action, except [to recover improper distributions made to shareholders during the wind-up process].

AS 10.06.678(a) authorizes a dissolved corporation to wind up its affairs. We construe this section to mean that a dissolved corporation may initiate a proceeding before an administrative body such as an agency board of contract appeals.

We recognize that AS 10.06.678(b) expressly prohibits a dissolved corporation from commencing a court action. This raises the question of whether or not filing an appeal before an administrative body is a court action for purposes of the statute. The Alaska statutes do not define what is meant by a court action. Unrelated Alaska statutes suggest that a court action and an administrative proceeding do not stand on the same footing under Alaska law. *E.g.*, AS 21.33.031(b) (insurance proceedings may be delayed so that a defendant may “offer a defense in the court action or administrative proceeding”); AS 25.27.020(a)(11) (paternity shall be established “administratively . . . or through court action”); AS 25.27.040(a), (c) (references to the word “action” changed to “court action.”). Moreover, in *Alaska Mines and Minerals, Inc. v. Alaska Industrial Board*, 354 P.2d 376, 379 (Alaska 1960), the Alaska Supreme Court stated that the prohibition on commencing a court action (in connection with a predecessor statute) did not apply to proceedings before the Alaska Industrial Board because the statute referred “only to a court, and not to a quasi-judicial or administrative agency.” Thus, we conclude that appellant had the capacity to file the subject appeal.

In view of the foregoing rulings, we need not address the government’s remaining arguments.

The government’s motion to dismiss is denied.

Dated: 18 January 2005

ELIZABETH A. TUNKS
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. 53806, Appeal of AEI Pacific, Inc., rendered in conformance with the Board's Charter.

Dated:

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