

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
 )  
Dual, Inc. ) ASBCA Nos. 53827, 53889  
 )  
Under Contract No. F33657-93-C-0046 )

APPEARANCE FOR THE APPELLANT: Mr. J. Fred Dual  
President

APPEARANCES FOR THE GOVERNMENT: E. Michael Chiaparas, Esq.  
Chief Trial Attorney  
Douglas R. Jacobson, Esq.  
Trial Attorney  
Defense Contract Management Agency  
Ft. Snelling, MN

OPINION BY ADMINISTRATIVE JUDGE REED  
ON GOVERNMENT’S SECOND MOTION TO DISMISS  
FOR LACK OF JURISDICTION

In a second motion to dismiss for lack of jurisdiction (gov’t mot.), clarified by a letter in response to the Board’s request for additional information, the government asks that we dismiss ASBCA No. 53827 without prejudice for lack of jurisdiction if the appellant’s termination for convenience settlement proposal (TFCSP) claim was a nullity. If the claim was valid, the government contends that the appeal from the contracting officer’s final decision (COFD), initially docketed by the Board as ASBCA No. 53827, was a nullity and must be dismissed without prejudice. Concerning ASBCA No. 53889, which the Board later docketed on account of the government claim included within the COFD, the government suggests that appellant failed to file a valid notice of appeal within ninety days of receipt by it of the COFD. Therefore, contends the government, the purported appeal from the government claim must be dismissed with prejudice for lack of jurisdiction.

These arguments flow from the government’s position that appellant, a Maryland corporation, was defunct at all relevant times, having forfeited its corporate charter, and that the corporation’s president and CEO could not act for the defunct corporation. The government contends that contractual and statutory time limits passed without valid action by appellant. Therefore, appellant lost the right to submit to the CO a TFC claim and forfeited the right to appeal to the Board from the CO’s unilateral determination.

The government suggests that actions taken by the corporation after its charter was revived did not relate back and cure defects in the claim and notice of appeal because such rights were extinguished while the corporate charter was forfeited.

Appellant argues in opposition that the government waived any right to challenge appellant's capacity to maintain the appeals. Appellant also contends that any government defense related to capacity of the corporation should be rejected because appellant revived its corporate charter. Such revival, contends appellant, relates back and validates the various actions that led to a proper claim, COFD, and appeal to the Board.

The government submitted a response to appellant's opposition. Appellant supplied a letter in reply to the government's response.<sup>1</sup>

The Board earlier published a decision that addressed the government's first motion to dismiss. *Dual, Inc.*, ASBCA No. 53827, 04-2 BCA ¶ 32,636. On the date of that decision, 14 May 2004, the Board had not yet been informed of the alleged lack of capacity in the appellant corporation.

#### FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. Dual and Associates, Inc. was formed in 1983 as a corporation under the laws of the State of Maryland. In 1992, Dual and Associates, Inc. effected a name change to Dual, Inc. (R4, tab 61) *Dual, Inc. v. Lockheed Martin Corp.*, 383 Md. 151, 158, 857 A.2d 1095, 1098 (2004) (hereinafter *Lockheed*).

2. In 1994, the government awarded Contract No. F33657-93-C-0046 (the contract), in the initial amount of \$7,994,327, to Dual and Associates, Inc. by way of a tripartite agreement pursuant to § 8(a) of the Small Business Act, as amended, 15 U.S.C. § 637(a). The contract was signed on 26 May 1994 for Dual and Associates, Inc. by its Director of Contracts, Patti A. Price, on 6 June 1994 by Contract Manager Shapleigh C. Drisko for the U.S. Small Business Administration, and on 7 June 1994 by CO Kenneth J. Lang for the U.S. Air Force (USAF), the procuring agency of the government. The contract incorporated by reference, among other standard provisions, the following: FAR 52.233-1 DISPUTES (DEC 1991) and FAR 52.249-4 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (SERVICES) (SHORT FORM) (APR 1984). The contract also included FAR 52.219-17 SECTION 8(a) AWARD (FEB 1990) tailored to the government activity administering the contract. (Government's Board Rule 4 appeal file (R4), tab 3 at 1-2,

---

<sup>1</sup> After the motion was ready for decision, former counsel, Raymond D. Battocchi, Esq. and Walter H. Fleischer, Esq., Gabeler Battocchi Griggs & Powell, PLLC, McLean, VA, withdrew.

37, 40-43) The contract price was increased to \$27,346,051 over the life of the contract (compl. ¶ 12; answer ¶ 8). Appellant admits receiving payments totaling \$20,524,253 (R4, tab 37 at 15, 19). The government asserts that Dual, Inc. has been paid \$26,148,664 under the contract (answer ¶ 8).

3. Tripartite contract Modification No. P00010 (mod 10), signed for the contractor on 6 June 1996 by its Director of Contracts, Joseph G. Calandrino, and by the same government representatives as above on 8 and 11 July 1996, respectively, names the contractor as Dual and Associates, Inc. (appellant's Board Rule 4 appeal file supplement (app. supp. R4), tab A2). Record documents dated from 15 November 1993 forward refer to Dual, Inc. (R4, tab 2). Unilateral mod 37, dated 3 May 1999, recited the contractor as Dual, Inc. (app. supp. R4, tab A24). Other modifications to the contract are not in the record (except mod 38, which will be discussed below). The record does not show when, if at all, the parties formally effected a name change or novation under the contract. Other than the award document and mod 10, cited and described above, the record refers to the contractor as Dual, Inc. (hereinafter also "appellant"). Contractor correspondence in the record signed by J. Fred Dual, Jr. (Mr. Dual; sometimes without "Jr.") from 1 March 1991 forward (R4, tab 1) was variously signed over the titles President and CEO or President or no title.

4. On 2 October 1997, the contractor's Maryland corporate charter was forfeited. *Lockheed*, 383 Md. at 158, 857 A.2d at 1098. The forfeiture resulted from the contractor's "non-payment of certain state taxes" (compl., ¶ 47 at 12). The entity that purported to be Dual, Inc. continued to transact business by performing the contract without regard for the forfeiture of the corporate charter. As of 1999, Mr. Dual became the sole corporate director for Dual, Inc. (app. opp'n ex., declaration of J. Fred Dual dated 14 January 2005, ¶ 2).

5. By unilateral mod 38, dated 8 June 1999, effective 10 June 1999, USAF CO Elaine C. Rourke terminated the contract for the convenience of the government pursuant to FAR 52.249-2 and FAR 52.249-6 (app. supp. R4, tab A33). Neither FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) nor FAR 52.249-6, TERMINATION (COST REIMBURSEMENT) was included in the contract at award. However, the government relied on these provisions in mod 38 and appellant relied on both provisions, among other authorities, in its opposition to a pending government motion for partial summary judgment. In opposition to that motion, appellant asserted that the short form convenience termination provision incorporated into the contract, FAR 52.249-4 (finding 2), "obviously did not fit the . . . contract" (app. opp'n to gov't mot. for partial summary judgment at 45, 49, 81-82). Appellant also relied on FAR 52.249-2 and FAR 52.249-6 in its opposition to the government's first motion to

dismiss, at 4. We find that there is no dispute as to the applicability to this matter of FAR 52.249-2 and FAR 52.249-6.

6. The contractor purported to submit an initial interim TFCSP, dated 1 September 1999 (R4, tab 11). A revised final TFCSP dated 18 May 2000, ostensibly certified by Mr. Dual, as the contractor's President, with his signatures on SF 1435 and 1437, both dated 18 May 2000, was submitted on or about that date (R4, tab 37).

7. In our earlier decision, prior to notification to the Board that appellant's corporate charter was forfeited, we determined that by Mr. Dual's 16 August 2001 e-mail rejection of the government's final position on the TFCSP and demand for the CO's unilateral determination, the TFCSP evolved into a claim under the contract. *Dual*, 04-2 BCA ¶ 32,636 at 161,492.

8. Termination CO (TCO) Paul E. Slemons, Defense Contract Management Agency, issued to the contractor a unilateral determination and COFD dated 8 March 2002. The COFD considered and denied the contractor's supposed TFCSP claim and asserted a government claim for return by the contractor of alleged overpayments under the contract. The first two pages of the decision document summarize the TCO's determination and final decision concerning the amounts due the contractor on account of the TFC. Considering the government's liability and payments allegedly made by the government under the contract, TCO Slemons determined that the contractor had been overpaid and was indebted to the government. Payment of the indebtedness to the government was demanded in the COFD. On the second page, the document includes information related to the contractor's rights either to appeal from the COFD to this Board "within 90 days from the date you receive this decision" or to "bring an action directly in the United States Court of Federal Claims . . . within 12 months of the date you receive this claim." Attachments listed on the second page are the "Government Position" and "Rules of the ASBCA." Attached to the copy of the COFD in the record were thirty pages of explanatory material detailing financial and other bases for TCO Slemon's COFD. (R4, tab 59)

9. In response to the Board presiding administrative judge's spoken directive on 2 March 2005, confirmed in the Board's Telephone Conference Memorandum and Order dated 3 March 2005, ¶ I., which addressed the motion decided here, the government provided a printout of an e-mail exchange between Messrs. Slemons and Dual, dated 7 and 9 March 2002. In the e-mail, TCO Slemons explains that he forwarded the COFD via e-mail to Mr. Dual on 7 March 2002, and that the hard copy was mailed to Dual, Inc. on 8 March 2002. By e-mail dated 9 March 2002, Mr. Dual advised TCO Slemons that only the first two pages were received via e-mail and that neither the "Rules of the ASBCA" nor the "rationale" attachment to the decision was received. (Enclosure to

Government's Response to Appellant's Motion to Suspend Proceedings and Response to Board Order of March 9, 2005)<sup>2</sup> During a telephone conference among the Board and counsel for each party on 2 March 2005, appellant's counsel Fleischer could not state with certainty the date on which the contractor received the COFD; however, he advised the Board that he recalled no inordinate delay in receipt of the COFD by the contractor (Board Telephone Conference Memorandum and Order dated 3 March 2005, ¶ I.). We find that the entity purporting to be Dual, Inc. received the text of the first two pages of the COFD dated 8 March 2002, including information related to the contractor's right to appeal to this Board, via e-mail not later than 9 March 2002 when Mr. Dual responded to TCO Slemons' e-mail dated 7 March 2002. We infer that appellant received the COFD hard copy, with attachments, via surface mail not later than 15 March 2002.

10. An alleged Notice of Appeal by counsel for appellant, dated 5 June 2002, was hand-delivered to the Board on that date. The Board docketed the appeal on that date as ASBCA No. 53827. (Gov't mot. ex. G-2)

11. Not later than 11 June 2002, TCO Slemons learned of the contractor's forfeited corporate status by checking listings maintained by the Maryland Secretary of State. On or about 19 June 2002, TCO Slemons notified former government trial attorney Thomas S. Tyler. (Gov't mot. ex. G-6)

12. On 25 July 2002, the contractor's State of Maryland corporate charter was revived. *Lockheed*, 383 Md. at 158, 857 A.2d at 1098. By this act, the contractor indicated its intent to continue in business. There is no evidence that Dual, Inc. was, at any time relevant to this motion, winding up its business or liquidating. No record evidence shows any action by any corporate director acting as a trustee under Maryland law. (Findings 3-4)

13. Appellant submitted its complaint in ASBCA No. 53827 under counsel's letter dated 29 July 2002.

---

<sup>2</sup> By Motion to Suspend Proceedings, served on 8 March 2005, appellant requested, for reasons unrelated to the government's second motion to dismiss, that the Board "suspend all proceedings in this case." The Board cancelled the scheduled final pre-hearing telephone conference and the hearing under the Board's Rules. All other pre-hearing proceedings under the appeals were suspended pending the government's response to appellant's motion to suspend. As indicated above, the government responded to appellant's motion to suspend. Appellant provided a reply. The Board then determined that the processing of this motion would continue.

14. On or about 2 August 2002, the contractor provided to the TCO a self-styled supplemental certification of the revised final TFCSP dated 18 May 2000. The language in the supplemental certification mirrors that prescribed in the Disputes provision of the contract, FAR 52.233-1(d)(2) and in the Contract Disputes Act of 1978 (the CDA), 41 U.S.C. §§ 601 and following, specifically § 605(c)(1). (Finding 2; declaration of Raymond D. Battocchi dated 6 December 2002, ex. 1)

15. On 6 August 2002, the Board separately docketed, as ASBCA No. 53889, the government's claim for repayment by Dual, Inc. of the alleged indebtedness (gov't mot. ex. G-2).

16. The government's answer made no specific negative averment in connection with appellant's capacity to take the appeal before the Board from the COFD. *See* Fed. R. Civ. P. 9(a).

## DECISION

### Law Applicable to Contractor Status

Under the CDA, 41 U.S.C. §§ 601(4), 605(a), a contractor, that is, the party to the contract other than the government, must submit a contractor claim. *Weststar, Inc.*, ASBCA Nos. 52837, 53171, 03-1 BCA ¶ 32,248 at 159,447, *rev'd on other grounds on recons.*, 04-1 BCA ¶ 32,501. Under these appeals, the contractor is Dual, Inc., a corporation (findings 1-3).

Where the contractor is a corporation, the capacity of that corporation to act is determined by reference to the law of the place of incorporation. *Melrose Distillers, Inc. v. United States*, 359 U.S. 271, 272 (1959); *Talasila, Inc. v. United States*, 240 F.3d 1064, 1066 (Fed. Cir. 2001); *Chrysler Credit Corp. v. Superior Dodge, Inc.*, 538 F.2d 616, 619 (4<sup>th</sup> Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977); *DCO Construction, Inc.*, ASBCA Nos. 52701, 52746, 02-1 BCA ¶ 31,851 at 157,403; *see* Fed. R. Civ. P. 17(b) (capacity of a corporation determined by the law under which the corporation was organized). Accordingly, the applicable law concerning the contractor's corporate status is the law of the State of Maryland (finding 1).

Pursuant to Md. Code § 2-103(2), (4)-(5), Dual, Inc. as a corporation was empowered to sue, to be sued, to complain, and to defend in "all courts;" to make contracts; and to transact business. We understand such powers to include the ability to submit a claim to a contracting partner of the corporation, including the United States, to appeal to this Board an adverse action by the government CO on a contractor claim, and to appeal to this Board from a claim by the government against the contractor.

Under Md. Code § 3-503(a)(1), when a Maryland corporation fails to pay a tax due before 1 October of the year after the tax becomes due, it is the duty of the State's Comptroller to certify a list of that and every other Maryland corporation that has not paid such taxes. Subsection (d) of that section states:

Proclamation. -- After the lists are certified, the [Maryland] Department [of Assessments and Taxation (Md. Code § 1-101(j))] shall issue a proclamation declaring that the charters of the corporations are repealed, annulled, and forfeited, and the powers conferred by law on the corporations are inoperative, null, and void as of the date of the proclamation, without proceedings of any kind either at law or in equity.

According to the courts of Maryland, the intent of this statute is that all powers granted by Maryland law to corporations are inoperative after forfeiture. "A corporation, the charter for which is forfeit, is a legal non-entity; all powers granted to [a corporation] by law . . . [are] extinguished generally as of and during the forfeiture period." *Lockheed*, 383 Md. at 163, 857 A.2d at 1101. Corporate existence terminates upon forfeiture and the corporate assets are transferred to the directors, as trustees, for the purposes of winding up the business of the former corporation. Upon forfeiture, corporate officers are devoid of authority to act for the corporation. *Cloverfields Improvement Association, Inc. v. Seabreeze Properties, Inc.*, 32 Md. App. 421, 425, 362 A.2d 675, 679 (1976), *aff'd*, 280 Md. 382, 373 A.2d 935, *modified on other grounds*, 280 Md. 400, 374 A.2d 906 (1977); Md. Code § 3-515(a).

Revival of a corporate charter and its effects are provided for under Md. Code § 3-512, as follows, in pertinent part:

(1) If otherwise done within the scope of its charter, all contracts or other acts done in the name of the corporation while the charter was void are validated, and the corporation is liable for them; and

(2) All the assets and rights of the corporation, *except those . . . of which it was otherwise divested while the charter was void*, are restored to the corporation to the same extent that they were held by the corporation before the . . . forfeiture of the charter. [italics added]

## Law Applicable to the Validity of Dual's Actions

### a. Corporate Charter Forfeiture and Winding Up

Although the contractor continued to conduct business, under Maryland law, the corporate charter of Dual, Inc. was forfeited during the time when the government terminated the contract for convenience, when the TFCSP allegedly was submitted, when the TFCSP claim appeared to arise, when the COFD was issued, and when the appeal to the Board from that COFD supposedly was taken. The purported TFCSP was submitted and ostensibly evolved into a claim based on actions taken by a corporate officer of the contractor. Dual, Inc.'s appeal to the Board was noticed on behalf of the corporation. (Findings 4-10) None of the actions were taken by a person purporting to act as a director-trustee for the contractor (finding 12). The issue then is whether, under Maryland law, the revival of Dual, Inc.'s corporate charter restored the validity of actions taken by or for the contractor or whether the assets or rights of Dual, Inc. to submit a TFCSP, to submit a claim, and to take an appeal were divested under Maryland law while the charter was void.

In *International Crane Co.*, ASBCA No. 49604, 00-1 BCA ¶ 30,624, *aff'd on recons.*, 00-2 BCA ¶ 31,085, we allowed a Maryland corporation with a forfeited charter to maintain its claim and appeal before the Board. The request for an equitable adjustment under that contract was signed by a corporate director, albeit in his capacity as a corporate officer, prior to forfeiture of the corporate charter but was certified as a claim by a different former corporate officer, not a director-trustee, after forfeiture. The Board held that the claim was valid because "the director-trustees had the right to carry out the contracts of the corporation and to do all things necessary to wind up the affairs [of the corporation including] the act of certification [of the claim]." We determined that certifying the claim was "a right [of the corporation] that was properly exercised under Maryland law" and "that the Maryland statute does not require that the director-trustees personally sign all documents," thereby inferring that the director-trustees had authorized execution of the claim certificate by another. 00-2 BCA at 153,487-88.

The Board allowed the appeal before the Board to continue because we determined, based on Maryland statutes and court decisions, that the appeal was "consistent with and rationally related to 'winding up' the corporate affairs" and because the notice of appeal had been signed by a corporate director-trustee (although purporting to act as an officer of the corporation). 00-1 BCA at 151,173 (finding 9) and 151,174.

The appeal in this case differs. Dual, Inc. has not indicated that it is winding up all corporate affairs. To the contrary, Dual, Inc. performed the contract until it was terminated (finding 5). Thereafter, Dual, Inc. revived its corporate charter indicating its

intent to continue the firm's existence (finding 12). In Mr. Dual's unsworn declaration dated 14 January 2005, "under penalty of perjury," ¶ 3, attached to appellant's opposition, he states that after the termination, "Dual[, Inc.] has been engaged in winding up terminated or complete contracts." The declaration does not address contracts that have not been terminated or that are not completed. It also does not specify, if Dual, Inc. is winding up, when winding up began. There is no evidence that Dual, Inc. was winding up all business or had ceased all attempts to obtain new business at times relevant to the motion.

Md. Code § 3-515 entitled POWERS OF DIRECTORS ON FORFEITURE provides as follows, in pertinent part:

(a) Directors become trustees. -- When the charter of a Maryland corporation has been forfeited, *until a court appoints a receiver*, the directors of the corporation become the trustees of its assets *for purposes of liquidation*.

(b) General powers. -- The director-trustees are vested in their capacity as trustees with full title to all the assets of the corporation. They shall:

(1) Collect and distribute the assets, applying them to payment, satisfaction, and discharge of existing debts and obligations of the corporation, *including necessary expenses of liquidation*; and

(2) *Distribute the remaining assets among the stockholders*.

(c) Specific powers. -- The director-trustees may:

(1) Carry out the contracts of the corporation;

(2) . . . .

(3) Sue or be sued in their own names as trustees or in the name of the corporation; and

(4) Do all other acts consistent with law and the charter of the corporation necessary or proper *to liquidate the corporation and wind up its affairs*.

(d) . . . .

(italics added)

No record evidence shows that Dual, Inc., Mr. Dual acting as director-trustee, or any other person or entity petitioned a court to appoint a receiver. There is no evidence of liquidation activities or expenses incurred by Dual, Inc. or by Mr. Dual. There is no

evidence of collection and distribution of remaining assets to pay all remaining debts, to discharge all corporate obligations, or of final distribution to stockholders.

In *Lockheed*, Maryland's highest court construed § 3-515 as "intended only for the 'winding up' of a corporation's affairs," citing *Patten v. Board of Liquor License Commissioners*, 107 Md. App. 224, 233-34, 667 A.2d 940, 944-45 (1995) and § 3-515(a) and (c)(4). "Thus, a trustee only may sue in the trustee's own name if there is a 'rational relationship' between the suit and a legitimate 'winding up' activity of the corporation." 383 Md. at 163-64, 857 A.2d 1102.

Mr. Dual argued before the *Lockheed* court that he was acting in his capacity as a trustee. The court found that argument "unavailing" because, like the circumstances in *Patten*, there were "no allegations in the . . . complaint to support [Mr.] Dual's argument that he was 'winding up' Dual, Inc.'s affairs at the time of the . . . complaint or at any time between forfeiture and these filings. . . . In fact, the record indicates not that [Mr.] Dual was 'winding up' Dual, Inc.'s affairs after its charter became forfeit in 1997, but rather that he actively was conducting business during this time on behalf of a corporation with a forfeit charter." 383 Md. at 163 n.4, 165, 857 A.2d 1101 n.4, 1102.

We are in no position to question the construction and application of Maryland law by that State's highest court. Rather, we are obliged to adhere to the court's decision. We further rely on the factual circumstances in *Lockheed* by comparison to the facts in the appeal before the Board. The time period being described in *Lockheed*, October 1997 through October 2001, covers much the same time period as is pertinent to the Board appeal, October 1997 (finding 4) through June 2002 (finding 10). During the TFCSP process, neither Dual, Inc. nor Mr. Dual asserted that appellant's actions were in furtherance of "winding up" the affairs of Dual, Inc. or a liquidation of the corporation (findings 4-10, 12). The complaint filed before the Board by Dual, Inc., dated 29 July 2002, 4 days after reinstating its corporate charter (findings 12-13), makes no assertions related to "winding up" Dual, Inc.'s affairs or a corporate liquidation. Instead, the complaint avers that Dual, Inc. "is a corporation established under the laws of Maryland, and is in good standing under those laws" (compl. ¶ 2). This statement affirms or at least implies that Dual, Inc. is open for and amenable to ongoing business. In short, there is a substantive difference between closing out the contract under which the appeal arose and winding up all of Dual, Inc. affairs and/or liquidating the corporation.

#### b. Corporate Charter Revival

In *Chrysler Credit v. Superior Dodge*, 538 F.2d at 617, the United States Court of Appeals for the 4<sup>th</sup> Circuit recited that the jury in the United States district court below had found Chrysler in violation of a federal statute and had adjudged Chrysler liable to

Superior and others for fraud and tortious interference with a contract. The jury also found Superior and others liable to Chrysler on a promissory note. Both parties moved the district court for judgment notwithstanding the verdict. In its motion, Chrysler contended that Superior's corporate charter had been revoked and that it lacked the capacity to sue. While the motion was pending, Superior revived its corporate charter. The district court determined that Superior's corporate revival was of no consequence, that Superior had not proved its capacity before the trial court (where capacity had been earlier challenged in the amended pleadings, by evidence of charter forfeiture, and by a motion for a directed verdict) and that the jury's verdict was not supported by the evidence. The district court amended the verdict to provide that Superior could not recover.

The 4<sup>th</sup> Circuit reversed. Relying on the Maryland corporate revival statute and *Redwood Hotel, Inc. v. Korbien*, 197 Md. 514, 521, 80 A.2d 28, 32 (1951), the appellate court gave full retroactive recognition to the revival of Superior's corporate charter after judgment. In *Redwood*, as summarized by the 4<sup>th</sup> Circuit, the corporation forfeited its charter. The next year, the corporation filed a petition in equity; however, the petition was dismissed for reasons other than lack of capacity. While an appeal from the dismissal was pending, the corporation revived its charter. The opposing party argued that the appeal should be dismissed because the corporate charter had been forfeited before the petition was filed and that the corporation lacked the capacity to file the petition. The Court of Appeals of Maryland denied dismissal because the corporate revival statute retroactively validated the corporation's capacity to file the petition. 538 F.2d at 618-19.

Neither *Chrysler* nor *Redwood Hotel* deal with an intervening statute of limitations or other divestment of a party's right to initiate a court action. *Lockheed*, 383 Md. at 166, 857 A.2d at 1103. In *Lockheed*, the Court of Appeals of Maryland determined that Dual's duty to discover any claim arising from the pertinent circumstances in that case commenced no later than 10 June 1999 and that the applicable Maryland statute of limitations was three years. *Id.* at 160 n.2, 169, 1099 n.2, 1105. The court held that Dual's initial court action, filed on 1 October 2001, within the three-year limitations period, by Mr. Dual as an officer of the corporation, while the contractor's corporate charter was forfeited, was ineffective to toll the applicable statute of limitations. *Id.* at 163, 1101. The court further held that the amended complaint, filed on 2 October 2002, after Dual, Inc.'s corporate charter had been revived, did not "relate back to the original complaint [in 2001] for statute of limitations tolling purposes." The court distinguished *Chrysler*:

While the revival of a corporate charter may validate retrospectively the capacity of a corporation to sue in certain

circumstances, [citing *Chrysler*], such a revival does not restore rights that were divested during the period when the corporate charter was forfeit. . . . under Maryland law, where a corporation's claim is barred by the applicable statute of limitations, that claim is not resuscitated thereafter when the corporation's charter is revived.

*Id.* at 166, 1103; accord *United States ex rel. T-J Siding Contractors, Inc. v. Fireman's Insurance Co. of Newark, New Jersey*, 869 F.Supp. 347 (D. Md. 1994).

### CDA Statute of Limitations

The six-year statute of limitations under the CDA does not apply in these appeals because the contract was awarded prior to 1 October 1995. *Motorola, Inc. v. West*, 125 F.3d 1470, 1473-74 (Fed. Cir. 1997). Accordingly, Dual, Inc. may submit a claim at any time unless otherwise time-barred by the contract or other applicable law or regulation.

### Contractor TFCSP Claim

The government argues that the TFCSP submittals from Dual, Inc. were a nullity because the corporation was defunct when they were supplied to the government. Pursuant to FAR 52.249-2(d), upon termination for the convenience of the government, the contractor was obliged to submit "a final termination settlement proposal to the [CO] . . . no later than 1 year from the effective date of termination . . . However, if the [CO] determines that the facts justify it, a [TFCSP] may be received and acted on after 1 year . . . ." FAR 52.249-6(e) includes identical language. The effective date of the termination was 10 June 1999 (finding 5).

Dual, Inc. was not empowered to take corporate action, including submitting a TFCSP and certifying it, until its corporate charter was revived. That revival occurred on 25 July 2002 (finding 12), long after the time period for providing a TFCSP to the CO had passed on or about 10 June 2000 (finding 5). Even if we consider that the TCO continued to consider Dual, Inc.'s TFC costs until 8 March 2002, when he issued the purported COFD (finding 8), Dual, Inc.'s ability to submit a TFCSP had not yet been revived (findings 9, 12).

Consequently, no authoritative TFCSP was submitted during the one year or other extended time within which such proposals could have been submitted. Neither was the corporate charter revived during that time. By not supplying an authoritative TFCSP during the one year period after the effective date of the TFC, Dual, Inc. was divested of

the right to submit a TFCSP by the TFC provision's time limit and by operation of Maryland law as construed by Maryland courts. While the one year time limit for submission of a TFCSP is not a statutory time limit, such as the statute of limitations in *Lockheed*, it is a clear time limit in FAR 49.206-1(a), the FAR is promulgated pursuant to a federal statute, 41 U.S.C. § 405(a), and the regulation has the force and effect of law, *Boeing Defense & Space Group*, ASBCA No. 50048, 98-2 BCA ¶ 29,779 at 147,561; *see G.L. Christian and Associates v. United States*, 312 F.2d 418, 424 (Ct. Cl.), *cert. denied*, 375 U.S. 954 (1963) (ASPR "had the force and effect of law").

Whatever remained of the contractor as of 8 March 2002 was placed in a position that allowed the TCO to make a unilateral determination based on available information. *England v. The Swanson Group, Inc.*, 353 F.3d 1375, 1377 (Fed. Cir. 2004); *B.V. Construction, Inc.*, ASBCA Nos. 47766 *et al.*, 04-1 BCA ¶ 32,604 at 161,363 n.3.

Absent an authoritative TFCSP, no contractor claim based on a TFCSP could have evolved.<sup>3</sup> Having no contractor claim, the action taken by the TCO dated 8 March 2002 could not be a final decision on a contractor claim. Having no contractor claim and no COFD on a contractor claim means there is no appeal before the Board as any such appeal might relate to a claim by the contractor. Accordingly, ASBCA No. 53827, which allegedly was an appeal from denial of a contractor claim, must be dismissed for lack of subject matter jurisdiction. *Swanson*, 353 F.3d at 1379-80; *see Easterbrook/Ramco*, ASBCA Nos. 42176 *et al.*, 94-2 BCA ¶ 26,658, *aff'd on recons.*, 94-2 BCA ¶ 26,851 (suspended corporation could not submit valid claim under California statute).

Dual, Inc.'s complaint and self-styled supplemental certification dated 2 August 2002 (findings 13-14) cannot relate to a TFC claim because the ability to submit a TFCSP and TFC claim was extinguished during the period when Dual, Inc.'s corporate charter was forfeited. Dual, Inc. was divested, during the time when its corporate charter was forfeited, of the right to submit an authoritative TFCSP by the passage of time, by the CO's unilateral determination (findings 4-5, 8, 12), and by operation of Maryland law as construed by the courts of Maryland.

The contract provides that a contractor has no ability to appeal from a CO unilateral determination if the contractor fails to submit a TFCSP within the time

---

<sup>3</sup> Our previous decision found that an impasse had been reached on or about 16 August 2001 concerning Dual, Inc.'s TFCSP such that a contractor claim evolved. 04-2 BCA at 161,491 (finding 15), 161,492. As stated above, that decision was taken before we were notified that Dual, Inc. was, at the relevant time, a defunct corporation under Maryland law. As of that date, Dual, Inc.'s corporate charter was forfeited and had not been revived (findings 4, 12).

provided under the contract and fails to request a time extension for submittal of such a proposal. FAR 52.249-2(i); FAR 52.249-6(i). *See Do-Well Machine Shop, Inc.*, ASBCA No. 36090, 88-3 BCA ¶ 20,994, *aff'd*, 870 F.2d 637 (Fed. Cir. 1989) (earlier termination provision at DAR 7-103.21(c) (1974)).

### Government Claim

The TCO's purported COFD dated 8 March 2002 not only allegedly denied what appeared to be a contractor claim, but also functioned as the CO's unilateral determination concerning Dual, Inc.'s convenience termination costs and set out a government claim for a refund (findings 8, 15). To the extent that the government made an affirmative claim under the contract against the contractor, there was no requirement for a contractor claim. Under the pertinent convenience termination provisions, FAR 52.249-2(i) and -6(i), if the CO makes a unilateral determination, any appeal of the unilateral determination before the Board must be denied based on the contract and the FAR. *Industrial Data Link Corp.*, ASBCA No. 49348, 98-1 BCA ¶ 29,634 at 146,847, *aff'd on recons.*, 98-2 BCA ¶ 29,866.

The contractor purported to appeal from the unilateral determination and from the COFD regarding the government claim for repayment of the alleged overpayment. However, no authoritative notice of appeal was submitted within the required time period. With respect to any government claim, receipt by Dual, Inc. of the TCO's final decision dated 8 March 2002 started the running of the CDA's 90-day appeal period for an appeal before the Board. Dual, Inc. received the CO's final decision no later than 15 March 2002 (finding 9). The 90-day time limit for an action before the Board ran no later than 13 June 2002. As of that date, Dual, Inc. had no authority to appeal (findings 4, 12) and no director-trustee took an appeal on behalf of the defunct corporation because Dual, Inc. was not winding up or liquidating its business.

Any appeal to the Board from the COFD setting forth the government claim is time-barred. Accordingly, ASBCA No. 53889 must be dismissed for lack of jurisdiction. *See Computer Products International v. United States*, 26 Cl. Ct. 518, 525-27 (1992) (assuming a proper claim was submitted by the defunct corporation, failure to file an authoritative complaint within the CDA time limits deprived court of jurisdiction).

### Government Waiver

Dual, Inc. argues first that the government waived the defense of lack of capacity by waiting more than two years to file the second motion to dismiss (finding 11). Appellant also relies on Fed. R. Civ. P. 9(a) for the proposition that lack of capacity must

be affirmatively raised by the opposing party. Appellant cites cases that are said to hold that a lack of capacity can be waived.

We are aware of no Board decision relying on Fed. R. Civ. P. 9(a); however, the Board generally looks to the federal rules for guidance. The cases cited by appellant all involve private parties, not the government. None are federal procurement decisions involving the time limits imposed by the CDA or provisions of a contract with the government. The decisions do not discuss the strict limits imposed on waivers of the government's immunity, such as by the CDA.

The government's motion ultimately goes to subject matter jurisdiction, not merely capacity to sue. The asserted basis for dismissal is divestiture of appellant-corporation's rights while the corporation was defunct. Jurisdictional CDA and contractual time limits were allowed to pass without authoritative action by Dual, Inc.

To the extent that the cited cases speak about the subject matter jurisdiction of federal courts, they point to a statutory basis for the court's subject matter jurisdiction. *E.g., Wagner Furniture Interiors, Inc. v. Kemner's Georgetown Manor, Inc.*, 929 F.2d 343, 345 (7<sup>th</sup> Cir. 1991) (federal subject matter jurisdiction found under 28 U.S.C. § 1332, diversity of citizenship). The jurisdictional statute here, the CDA, is at the heart of the government's contentions. Failure of an appellant to satisfy the CDA's definition of "contractor," even when connected with corporate capacity as determined by reference to local law, can rise to a jurisdictional level. *See Micro Tool Engineering, Inc.*, ASBCA Nos. 31136, 31350, 86-1 BCA ¶ 18,680 (appeals dismissed for lack of subject matter jurisdiction based on lack of corporate existence under Florida law). And, failure to take an appeal before the Board within the statutory period is a jurisdictional defect that cannot be waived. *Cosmic Construction Co.*, ASBCA No. 26537, 82-1 BCA ¶ 15,541, *aff'd*, 697 F.2d 1389, 1390 (Fed. Cir. 1982).

Appellant argues that dismissal under these circumstances cannot be reconciled with our decision in *Weststar*, 04-1 BCA ¶ 32,501. That decision was in response to an appellant's motion for reconsideration after the Board denied an application to substitute the surety as the real party in interest in the appeals and dismissed the appeals for lack of jurisdiction. 03-1 BCA ¶ 32,249. In that case, in August 2000, the contractor submitted a contractor claim to the CO. The CO did not issue a final decision; the contractor appealed to the Board based on a "deemed denial." As of 30 September 2000, the State of California revoked the contractor's corporate license. In November 2003, the contractor obtained from California a "certificate of revivor," which, under California law, reinstates the corporation "without prejudice to any action . . . or right which has accrued by reason of the original suspension . . ." 04-1 BCA at 160,789.

The situation in that case differs from Dual, Inc.'s case. There was in that case no impediment to submission of a contractor claim and appeal. Weststar's corporate revocation occurred after the statutory requirements for a proper claim and appeal had been met. The appeal could not go forward during Weststar's corporate suspension; however, it was already properly before the Board. *See Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198, 1202-03 (Fed. Cir. 2005) (plaintiff had standing in patent case when action commenced, assigned its patent during pendency of lawsuit, but regained its stake in the litigation when it reacquired the patent). Dual, Inc.'s ability to submit a TFCSP, to have it evolve into a TFC claim, and to appeal to the Board from denial of that claim all were extinguished while Dual, Inc.'s corporate charter was forfeited.

SUMMARY

The appeals are dismissed for lack of jurisdiction.

Dated: 29 March 2006

---

STEVEN L. REED  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur in result (see separate opinion)

---

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

OPINION CONCURRING IN RESULT  
BY JUDGE THOMAS

I concur in result. I believe that if we were writing on a clean slate, Mr. Dual's declaration submitted in opposition to the government's second motion to dismiss would sufficiently establish for purposes of this motion that appellant has been winding up its affairs since the termination for convenience. However, I also believe that appellant is precluded from making that argument by the litigation in the Maryland courts. Appellant actually litigated whether it was winding up its affairs during the relevant period and lost in a valid and final judgment of the Court of Appeals of Maryland. The determination was essential to the judgment, and is conclusive in these appeals. RESTATEMENT (SECOND) OF JUDGMENTS §§ 27, 29 (1982). Accordingly, I concur that we should dismiss the 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 Nos. 53827, 53889, Appeals of Dual, Inc., rendered in conformance with the Board's Charter.

Dated:

---

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