ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
RMS Technology, Inc.	)	ASBCA No. 50954
	)	
Under Contract No. DAAA09-92-C-0600	)	

APPEARANCE FOR THE APPELLANT: William A. Lascara, Esq.
Pender & Coward, P.C.
Virginia Beach, VA

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
Raymond M. Saunders, Esq.
CPT David J. Goetz, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE YOUNGER
ON RESPONDENT'S MOTION TO DISMISS

Respondent has moved to dismiss, contending that we lack jurisdiction because appellant had no standing to bring this appeal. Respondent insists that, when the appeal was filed, appellant was a terminated corporation and a former manager authorized the filing and prosecution of the appeal, although state law permits only former officers or directors, as trustees in liquidation, to do so. Appellant argues that the former manager was actually an officer of the corporation and that, in any event, a former director ratified his actions. We grant the motion and dismiss the appeal.

BACKGROUND

Effective 10 June 1992, respondent awarded contract no. DAAA09-92-C-0600 to appellant for the production and installation of remote target components on live-fire ranges. (R4, tab 1 at 1) Appellant was organized under the laws of the Commonwealth of Virginia. (Compl., ¶ 1; ans., ¶ 1)

During contract performance, by date of 1 March 1996, appellant petitioned for reorganization under Chapter 11 of the Bankruptcy Code. (R4, tab 2 at 1) Thereafter, by order dated 2 April 1997, the Bankruptcy Court lifted the automatic stay to permit respondent to terminate the contract and to reclaim Government property. (R4, tab 23 at 2) By notice dated the same day, the contracting officer terminated appellant's contract for default, and followed the notice with a final decision dated 13 May 1997, which also asserted a monetary claim for the return of $2,856,360.62 in unliquidated progress payments. (R4, tabs 24, 25 at 2)

By order dated 5 May 1997, the Virginia State Corporation Commission ("the Commission") involuntarily terminated appellant as a corporation "for failure to maintain a registered agent as required by law." (Motion to Dismiss [Motion], attachment 1 at 2) Commission records do not show, and appellant does not contend, that appellant's corporate status has since been revived. (*Id.* at 1-2) Accordingly, we find appellant's corporate status remains terminated. The Commission's records reflect that the 1995 and 1996 annual reports that appellant filed listed the following individuals as officers: Carlton A. Pieper, president; Harry T. Hunt, vice president; and Judith Pieper, secretary/treasurer. (*Id.* at 3-4; Respondent's letter to Board dated 8 November 1999 at 6) All three individuals were also listed as directors. (*Id.*) The Commission required that such reports be "signed by an officer or director," and, while appellant's 1995 report was certified as accurate by Mr. Pieper, its 1996 report was certified by Charles Heyman, whose title was listed as "Manager," by date of 26 August 1996. (*Id.*)

By letter dated 30 June 1997 to "RMS Technology, Inc. c/o Mr. Charles Heyman," appellant's counsel set forth the terms of an "Agreement for Legal Services." By the letter, appellant's counsel work initially included conducting a "feasibility study and analysis of [appellant's] Claim and . . . filing a Notice of Appeal in connection with the Contracting Officer's Final Decision." By date of 21 July 1997, Mr. Heyman countersigned the letter, which contains no representation that he was authorized to act for appellant. (Motion, attach. 5 at 2-3)

By letter dated 15 August 1997, appellant's counsel forwarded to the Recorder the notice of appeal of the same date regarding the contracting officer's 13 May 1997 decision terminating the contract for default and asserting a monetary claim for $2,856,360.62. (R4, tab 26) By date of 18 August 1997, we docketed the present appeal.

By date of 22 September 1999, after respondent raised the issue of appellant's dissolution, the Board issued an order directing appellant to show cause why the appeal should not be dismissed for lack of standing. In responding to the show cause order, appellant tendered a letter dated 1 October 1999 from its counsel to Mr. Pieper. In the letter, appellant's counsel advised Mr. Pieper that:

> [o]ur previous firm . . . was engaged by [appellant], acting through Mr. Charles Heyman, who represented himself to be authorized on behalf of [appellant], to appeal in connection with the Contracting Officer's Final Decision, dated May 13, 1997 . . . . Unfortunately, prior to Mr. Heyman's engagement of our services, the corporate existence of [appellant] was terminated by the State Corporation Commission . . . .
>
> I have represented [appellant] in connection with the appeal . . . , filing an appeal that is currently pending before

> the Armed Services Board of Contract Appeals . . . . The ASBCA has recently issued a Show Cause Order requiring that [appellant], . . . show cause why its appeal should not be dismissed for lack of standing due to the fact that [appellant's] corporate existence was terminated . . . , and no director as trustee in liquidation has authorized the referenced appeal to be filed. Accordingly, . . . it is requested that you sign . . . confirming the following: As trustee in liquidation of [appellant], you agree as follows:
>
> 1. [Appellant's] engagement of [its counsel] . . . is hereby ratified and affirmed;
>
> 2. All actions of this firm in proceeding with the referenced appeal . . . are hereby ratified and confirmed; and
>
> 3. You hereby authorize [appellant's counsel], and Charles Heyman, as authorized representative of [appellant], to prosecute the referenced appeal before the ASBCA.

Mr. Pieper signed the line signifying that he had "seen and agreed to" the letter. (Letter dated 1 October 1999 from appellant's counsel to the Recorder, ex. 3 at 1-2) Following service of appellant's response to the show cause order, respondent brought the present motion to dismiss.

In opposing the present motion, appellant has submitted a copy of its 1995 Quality Assurance Manual, which contains a "Top Level Organizational Chart." On this chart, Mr. Heyman is described both as "Vice President, Operations" and as "Administrative Specialist." (RMS' Memorandum of Points And Authorities In Opposition to the Government's Motion to Dismiss, ex. A at 13) For its part, respondent has tendered appellant's 1993 and 1994 financial reports, listing Mr. Pieper, Mr. Hunt and Ms. Pieper as the only officers and directors. (Respondent's letter to Board dated 8 November 1999 at 3, 5)

DECISION

In moving to dismiss, respondent urges that we lack jurisdiction because appellant did not have standing to file and prosecute this appeal. Respondent contends that, as a former employee of a terminated corporation, Mr. Heyman lacked authority, under Virginia law or otherwise, to file this appeal on behalf of appellant. Respondent further argues that, while Mr. Pieper, as a trustee in liquidation of appellant, was authorized under state law to initiate the appeal, his ratification of Mr. Heyman's unauthorized act over two years later cannot retroactively satisfy the 90-day filing period in 41 U.S.C. § 606. For its part, appellant points to several documents in the record that are said to show

that Mr. Heyman was an officer of appellant. Appellant also insists that, in any event, Mr. Pieper ratified Mr. Heyman's actions by signing the 1 October 1999 letter.

Appellant's right to bring the present appeal is circumscribed by the limitations in 41 U.S.C. § 606. It provides in part that "[w]ithin ninety days from the date of receipt of a contracting officer's decision . . . the contractor may appeal such decision " to the Board. It is familiar that this provision constitutes a waiver of sovereign immunity and, as such, must be strictly construed. *E.g.*, *Cosmic Construction Co., Inc. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982) As a result of 41 U.S.C. § 606, an appeal must be brought within the 90 day period, and can only be brought by the "contractor," which is defined in 41 U.S.C. 601(4) as "a party to a Government contract other than the Government." The question is whether the circumstances surrounding the initiation of this appeal bring it within 41 U.S.C. § 606.

The law of its state of incorporation – in appellant's case, Virginia – determines a corporation's capacity to maintain an appeal. *E.g.*, *Texas Trinity Manufacturing and Supply Co., Inc.*, ASBCA Nos. 10465, 11719, 73-1 BCA ¶ 9996 at 46,909 (holding that "it is the law of Texas which brought appellant corporation into being, and which determines whether and to what extent that life may continue for litigating purposes.")

Under Virginia law, the directors become trustees in liquidation of the corporate assets and affairs after termination for failure to maintain a registered agent. VA. CODE ANN. § 13.1-753 provides that:

> The corporate existence of a corporation may be terminated involuntarily by order of the [State Corporation] Commission when it finds that the corporation . . . (ii) has failed to maintain a registered office or a registered agent in this Commonwealth as required by law . . . . Upon termination, the properties and affairs of the corporation shall pass automatically to its directors as trustees in liquidation. The trustees shall then proceed to collect the assets of the corporation; . . . pay, satisfy and discharge its liabilities and obligations; and do all other acts required to liquidate its business and affairs.

See also VA. CODE ANN. § 13.1-752 (upon automatic termination for failure to file annual report or pay annual registration fee, corporate "properties and affairs shall pass automatically to its directors as trustees in liquidation").

Virginia law also provides for the survival of a remedy after the termination of corporate existence. VA. CODE ANN. § 13.1-755 provides that termination:

> shall not take away or impair any remedy available to or against the corporation, . . . for any right or claim existing or any liability incurred, prior to such termination. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim.

The predecessor provision to section 13.1-755 was construed not to limit the time within which actions could be brought by or against a dissolved corporation. However, "general statutes of limitation referable to the accrual of the cause of action remain applicable." *United States v. Village Corp.*, 298 F.2d 816, 818 n. 10 (4th Cir. 1962).

While appellant's former directors thus would have had the power to initiate this appeal within 90 days of the contracting officer's decision, we cannot say that any director did so on the present record. Appellant's annual reports filed with the State Corporation Commission list three directors – the two Piepers and Mr. Hunt – but not Mr. Heyman. There is no evidence that any of the three directors authorized Mr. Heyman to send his 21 July 1997 engagement letter to appellant's counsel or for the latter to file the notice of appeal thereafter. Indeed, we read the 1 October 1999 letter from appellant's counsel to Mr. Pieper to inform Mr. Pieper for the first time that counsel was engaged by Mr. Heyman, and that counsel had filed the present appeal.

We also do not regard Mr. Pieper's agreement to the 1 October 1999 letter as sufficient to overcome the 90 day time limit in 41 U.S.C. § 606. That limit is not subject to tolling. *See Cosmic, supra*, 697 F.2d at 1390. Assuming that Mr. Pieper was empowered to act for the other two directors, permitting ratification of Mr. Heyman's action over two years after the 90 day time limit has expired is not consistent with the strict construction accorded 41 U.S.C. § 606. *See id.*

The record also does not support appellant's contention that Mr. Heyman was an officer of appellant. VA. CODE ANN. §§ 13.1-752 and 13.1-753 both provide that, upon termination, corporate property and affairs pass to the "directors as trustees in liquidation," not to the officers as well. We do not read the last sentence of VA. CODE ANN. §§ 13.1-755, permitting shareholders, directors and officers "to take such corporate or other action" to protect a corporate remedy, as broadly as appellant does. Nonetheless, assuming that the former officers of a dissolved corporation have authority comparable to directors, we are unpersuaded that Mr. Heyman was an officer. There is no showing, by affidavit, corporate resolution or similar document, directly establishing that he was an officer. Appellant makes an inferential argument that he was an officer because he signed appellant's 1996 annual report to the State Corporation Commission and because he is listed in appellant's Quality Assurance Manual as "Vice President, Operations." With respect to the annual report, it is true that the Commission requires that annual reports be

"signed by an officer or director," but, without more, we cannot infer from the ministerial act of accepting a report for filing that the Commission determined that Mr. Heyman, who signed as "Manager," was in fact an officer. With respect to the manual, we have no basis to regard it as anything other than an internal instruction, and, in any event, Mr. Heyman is listed ambiguously both as "Vice President, Operations" and as "Administrative Specialist." The burden of proof is on appellant. *Friends of Earth, Inc. v. Laidlaw Environmental Services*, No. 98-822 (U.S. Jan 12, 2000). The manual and any inference as to Mr. Heyman's signature on an annual report that does not list him as an officer are inadequate to carry that burden in the face of annual reports which only list the Piepers and Mr. Hunt as the Officers of the Corporation

CONCLUSION

Respondent's motion to dismiss is granted. The appeal is dismissed for lack of jurisdiction.

Dated: 27 January 2000

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

CARROLL C. DICUS, JR.
Administrative Judge
Acting 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. 50954, Appeal of RMS Technology, Inc., rendered in conformance with the Board's Charter.

Dated:

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