ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of –	)	
	)	
DCO Construction, Inc.	)	ASBCA Nos. 52701, 52746
	)	
Under Contract No. N62467-96-C-0761	)	

APPEARANCES FOR THE APPELLANT: Scott Barat, Esq.
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APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
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OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON THE GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION
OR, IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT

DCO Construction, Inc. (DCO), seeks $402,456 plus interest and a 123-day extension of the contract completion date due to alleged changes and delays to a contract to convert a hangar into a shopping mall. The claim consists of $158,401 in extended overhead for DCO, $38,722 in extended overhead for DCO's electrical subcontractor, $18,783 in costs allegedly due under previous contract modifications and the return of $186,550 in liquidated damages. The Government moves to dismiss for lack of jurisdiction, alleging that DCO lacked the capacity to sue because it was administratively dissolved on the date the notices of appeal were filed. Alternatively, the Government moves for partial summary judgment on the grounds that (1) the subcontractor's claim for $38,722 is barred by the doctrines of *res judicata* or collateral estoppel due to the dismissal with prejudice of an earlier appeal; and (2) DCO's extended overhead claim is not cognizable because DCO failed to allege in its complaint that it was required to stand-by. DCO opposes the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 21 August 1996, the Government awarded a construction contract in the amount of $3,604,100 to DCO, a corporation organized under the laws of the state of Florida (R4, tab 2; Compl. ¶ 2; Answer ¶ 2). The work required conversion of a hangar into a shopping mall for the Naval Exchange at the Naval Air Station, Pensacola, Florida. The contract completion date, as extended, was 30 May 1997 (R4, tab 2, Mod. P00018).

2. Among other things, the contract required DCO to provide an intrusion detection system (IDS). Paragraph 1.4 of specification section 13702 stated that the existing system was manufactured by Monitor Dynamics, Inc. (MDI), and that "the new equipment shall be compatible and shall operate accurately and reliably with [the] existing system" (R4, tab 1).

3. DCO forwarded its IDS submittal to the Government for approval on 23 April 1997. The submittal was based on equipment manufactured by Fire Control Systems, Inc. (FCS) (ASBCA No. 51621, Rule 4, tab 7). The Government approved the submittal on 28 April 1997 (ASBCA No. 51621, R4, tab 13).

4. On or about 2 May 1997, Dennis T. Harty Electrical, Inc. (DTH), the subcontractor responsible for providing the IDS system, learned that the FCS equipment was not compatible with the MDI system in use at the base. As a result, DTH had to order the IDS equipment from MDI. The MDI equipment was more expensive and could not be delivered until 30 June 1997, 31 days after the extended contract completion date. (ASBCA No. 51621, R4, tab 14)

5. On 11 August 1997, Mr. Jim Tatum, DCO's project manager, submitted a claim in the amount of $51,267 to the contracting officer "for the additional expense incurred to procure special MDI system equipment" and extended overhead from 30 May 1997 to 30 June 1997 (the IDS claim) (ASBCA No. 51621, R4, tab 16).

6. The State of Florida administratively dissolved DCO for failure to file an annual report on 26 September 1997 (memo of telcon dated 6/26/00; app. br. at 10).

7. On 26 February 1998, the Government assessed DCO 91 days of liquidated damages at $2,050 per day for a total of $186,550 (R4, tab 2).

8. The contracting officer denied the IDS claim submitted by Mr. Tatum on 11 May 1998 (ASBCA No. 51621, R4, tab 17).

9. On 30 June 1998, Mr. Tatum timely appealed the denial of the IDS claim to this Board, where it was docketed as ASBCA No. 51621. The notice of appeal was on DCO letterhead and was signed by Mr. Tatum. The notice of appeal did not identify Mr. Tatum as a corporate officer or an attorney as required by Board Rule 26.

10. On 14 August 1998, the Board requested DCO to designate a Rule 26 representative.

11. By letter dated 15 October 1998, Mr. Tatum designated Mr. Terry L. Childers, DCO's president, as its Rule 26 representative.

12. On 30 October 1998, the Board ordered Mr. Childers to enter a notice of appearance within 20 days from receipt of the order. DCO received the order on 2 November 1998. The Board received no response to the order.

13. On 7 January 1999, the Board ordered DCO to show cause why the appeal should not be dismissed for failure to prosecute pursuant to Rule 31. DCO did not reply.

14. We dismissed ASBCA No. 51621 with prejudice for failure to prosecute on 16 February 1999.

15. On 7 July 1999, DCO submitted a claim for $402,544[*] to the contracting officer. The claim included $158,401 in extended overhead, $38,722 on behalf of DTH (the pass-through claim), $18,783 in costs allegedly unpaid under previously issued contract modifications and the return of $186,550 in liquidated damages. (R4, tab 86 at ex. 1) Only the claim for $18,783 relating to prior contract modifications is not at issue in this motion.

16. The pass-through claim "encompasses extended superintendence and project management costs involved in the extended work schedule caused by delays in answers to RFIs and issuance of changes and early move in of the building occupants." The period of time covered by the pass-through claim is 22 May 1997 through 4 September 1997. (R4, tab 86 at ex. 67)

17. The contracting officer failed to issue a decision on DCO's 7 July 1999 claim and Mr. Childers, DCO's president, appealed the deemed denial to this Board on 5 April 2000. The appeal was docketed as ASBCA No. 52701.

18. The contracting officer issued a decision on the 7 July 1999 claim on 13 April 2000 (R4, tab 90).

19. On 27 April 2000, DCO appealed the contracting officer's decision on the 7 July 1999 claim to this Board, where it was docketed as ASBCA No. 52746 (R4, tab 91).

20. DCO's corporate status was reinstated on 23 June 2000 (app. br. at 10, n.1).

21. DCO's complaint does not allege that it had to stand-by (Compl. at ¶¶ 62-65).

22. In opposition to the Government's motion, DCO submitted the declaration of Mr. Childers. His declaration, which is dated 21 November 2000, stated, in part, as follows:

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[*] The amount claimed appears to contain an addition error. The total amount should be $402,456, the same amount alleged in the complaint.

ASBCA No. 51621

1. I am the President, CEO and sole shareholder of DCO . . . .

2. At all times relevant to the purported claim and appeal in ASBCA No. 51621, I was also the President, CEO, and sole shareholder of DCO.

3. . . . I was the only person authorized to file and/or authorize the sponsorship of a claim on behalf of DCO against the government . . . . I did not delegate this responsibility to any other person.

4. Jim Tatum was an employee of DCO and the project manager for the Contract. Mr. Tatum was not an attorney or officer of DCO and was not authorized to commit DCO or file any legal actions on behalf of DCO.

. . . .

10. . . . DCO did not sponsor, authorize, or ratify the claim upon which the Navy contracting officer issued a decision on May 11, 1998 and did not file an appeal of that decision on June 30, 1998, that was subsequently docketed as ASBCA No. 51621 . . . .

11. The claims in ASBCA Nos. 52701 and 52746 are not based on the same transactional facts as ASBCA No. 51621. Appeal No. 51621 concerned a contract interpretation dispute over . . . the security alarm system. ASBCA Nos. 52701 and 52746 concern other government-caused delays and irregularities . . . . [They do] not concern the security system. . . .

. . . .

Stand By

13. The Claim includes seventy-nine (79) exhibits detailing the delay caused by the Navy's defective specifications, differing site conditions, and changes, including its failure to approve changes in a timely manner. Given the many delays and the Navy's refusal to grant any time extensions, it is clear that DCO necessarily was on stand by.

(Childers' Decl.)

DECISION

The Government's motion presents three issues. First, did DCO have the capacity to bring the subject appeals even though it was administratively dissolved on the dates the notices of appeal were filed? Second, is DTH's pass-through claim barred by the doctrines of *res judicata* and collateral estoppel due to our previous dismissal of ASBCA No. 51621? Third, is DCO's claim for extended overhead defective because it failed to allege that it had to stand-by in its complaint?

The capacity of a corporation to maintain an action is determined by the laws of the state under which it was organized. *Talasila, Inc. v. United States*, 240 F.3d 1064, 1066 (Fed. Cir. 2001). Accordingly, we look to the Florida Business Corporation Act for guidance. The Government argues that section 607.1622(8) of the statute supports its contention that DCO lacked capacity to sue. That provision provides that "[a]ny corporation [administratively dissolved for] failing to file an annual report . . . shall not be permitted to maintain or defend any action in any court of this state until such report is filed." Since appellant is not attempting to maintain or defend an action in a Florida state court, this section is inapplicable. Appellant cites section 607.1422(3), which states that reinstatement after administrative dissolution "relates back to . . . the effective date of the administrative dissolution," but does not address a dissolved corporation's capacity to sue. Section 607.1405, however, states that a dissolved corporation may engage in the following activities:

> § 607.1405 Effect of dissolution.
>
> (1) 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:
>
> (a) Collecting its assets;
>
> . . . .
>
> (e) Doing every other act necessary to wind up and liquidate its business and affairs.
>
> (2) Dissolution of a corporation does not:
>
> . . . .

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

There is no dispute that the notices of appeal in ASBCA Nos. 52701 and 52746 were filed during a period when DCO's corporate status had been administratively dissolved. DCO was administratively dissolved on 26 September 1997 and reinstated on 23 June 2000, and the notices of appeal were filed on 5 and 27 April 2000 respectively. Section 607.1405 indicates that DCO could carry on any business appropriate to wind up or liquidate its business and affairs, including collecting assets and commencing a proceeding in its corporate name. Thus, we conclude that DCO had the capacity to file the subject appeals notwithstanding the fact that it was administratively dissolved when the notices were filed. *TPS, Inc.*, ASBCA No. 52421, 01-1 BCA ¶ 31,375.

The Government next argues that it is entitled to partial summary judgment under the doctrines of *res judicata* or collateral estoppel. Summary judgment is appropriate when there are no material facts genuinely at issue 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). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) establish rules for determining the preclusive effect of a prior adjudication. *Hitt Contracting, Inc.*, ASBCA Nos. 51594, 51878, 99-2 BCA ¶ 30,442 at 150,419-20. Under *res judicata*, "'a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action.'" *Jet, Inc., v. Sewage Aeration Systems*, 223 F.3d 1360, 1362-63 (Fed. Cir. 2000) quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). Under collateral estoppel, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979).

Since ASBCA No. 51621 was dismissed for failure to prosecute, we did not decide any issues. Thus, the doctrine of collateral estoppel is inapplicable. In order for *res judicata* to apply, the second claim must be based on the same set of transactional facts as the first. *Jet*, 223 F.3d at 1362. According to Mr. Childers' unrebutted declaration, the second claim is based on a different set of transactional facts than the first. Accordingly, the Government has not established that it is entitled to summary judgment on the basis of *res judicata.* In view of this ruling, we need not address the other issues relating to *res judicata* raised by the Government.

The Government lastly moves for partial summary judgment, alleging that DCO's claim for extended or unabsorbed overhead is not cognizable because it failed to plead stand-by in its complaint. We view this argument as a motion to dismiss for failure to state a claim upon which relief can be granted. The "'two prerequisites to application of the *Eichleay* formula . . . [are]: (1) that the contractor be on stand-by and (2) that the contractor be unable to take on other work.'" *Charles G. Williams Construction, Inc. v. White*, 271 F.3d 1055, 1058 (Fed. Cir. 2001) quoting *Interstate Gen. Gov't Contractors, Inc. v. West*, 12 F.3d 1053, 1056 (Fed. Cir. 1993). The *Williams* decision does not require a contractor to allege stand-by in its complaint and we are not aware of any such authority. Accordingly, summary judgment on this issue is not appropriate.

The Government's motions are denied.

Dated: 2 May 2002

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)
I concur

I concur

EUNICE W. THOMAS
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

MARK N. STEMPLER
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. 52701, 52746, Appeals of DCO Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ

Recorder, Armed Services
Board of Contract Appeals