

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Valenzuela Engineering, Inc.) ASBCA Nos. 54939, 55464
)
Under Contract No. DACA09-99-D-0018)

APPEARANCE FOR THE APPELLANT: Scott R. Baker, Esq.
Arroyo Grande, CA

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Lawrence N. Minch, Esq.
U.S. Army Engineer District,
Los Angeles

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON MOTION TO DISMISS

The government moves to dismiss these appeals with prejudice contending, *inter alia*, that Valenzuela Engineering, Inc. (appellant or VEI) has failed to prosecute these appeals and alternatively, as a suspended corporation under California law it does not have the authority or capacity to prosecute these appeals. Appellant has filed in opposition to the motion. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613. For reasons stated below, we grant the government's motion.

FINDINGS OF FACT FOR PURPOSES OF MOTION

On 27 September 2000, the government awarded to appellant Task Order No. 0004 under a multiple award task order contract, Contract No. DACA09-99-D-0018, to replace the hot and chilled water line systems at the Federal Correctional Institute in Sheridan, Oregon (R4, tab 24).

During the course of performance, appellant experienced cost impacts for which it contended the government was responsible. By three letters to the government dated 10 April 2002, appellant filed requests for equitable adjustment (REAs), seeking, respectively, a recovery for delays in the amount of \$195,679.33; additional piping costs related to a contract modification in the amount of \$196,857.34; and additional costs for a government direction to install a pipeline with a different alignment than bid in the amount of \$215,500.47. Appellant did not identify any of these REAs as a claim, nor did it certify them to the contracting officer (CO), nor did it request a CO's decision under the Disputes clause or the CDA. (R4, tabs 1-A, 1-B, 1-C) By letters dated 2 December 2002, appellant provided certifications of costs, per DFARS 243.205-71 (R4, tab 178).

On 15 May 2003, the Board of Directors of VEI voted to dissolve the corporation (opp'n, decl. Valenzuela, ex. A). It is undisputed that appellant continued to work on the project through late 2003.

By letter to appellant dated 23 May 2003, the CO provided a preliminary assessment of the REAs. The CO stated, *inter alia*, that appellant's request for additional piping cost was barred by Modification No. 000401; the "differing alignment" request was without merit; and appellant failed to substantiate any specific delay for which the government was responsible. The CO advised that this preliminary assessment was subject to change upon receipt of additional information from appellant. This letter was not identified as a final CO decision under the Disputes clause or the CDA. (R4, tab 190)

Notwithstanding, appellant apparently was of the view that it was entitled to a CO's decision and failing to receive one, it filed a notice of appeal on each REA with the Board by three letters dated 22 March 2004 (R4, tab 217). The Board docketed the appeals as ASBCA Nos. 54604, 54605, and 54606 (R4, tab 219), but later dismissed the appeals on 7 October 2004 without prejudice, at the request of appellant, so that appellant could request a CO's decision (R4, tab 222).

According to the CO's decision dated 17 December 2004, appellant certified each of its claims on 25 April 2004, and requested a contracting officer's final decision on 7 October 2004 (R4, tab 2 at 2, 3). The CO's decision denied appellant's claims in their entirety, appellant filed a single appeal notice to this Board by letter dated 22 February 2005, and the Board docketed the appeal as ASBCA No. 54939.

On 1 November 2005, VEI filed another certified claim with the CO, seeking recovery for additional work, constructive changes and extended job site costs (compl. ¶ 14). The CO did not issue a final decision on this claim. Appellant deemed the claim denied, and appealed to this Board on 7 June 2006. The appeal was docketed as ASBCA No. 55464.

At the request of the parties, the Board consolidated the appeals by order dated 20 November 2006. By separate order of this date, the Board directed the parties to propose a discovery and hearing schedule by 11 December 2006. At appellant's request, the Board gave the parties an additional 30 days to comply with the scheduling order. (Bd. corr. orders dtd. 20 November 2006, 12 December 2006) However, appellant's counsel was unable to agree to a firm schedule because counsel had not received formal authorization to proceed on behalf of VEI.

During a telephone prehearing conference on 11 January 2007, the Board allowed appellant's counsel additional time, until 2 March 2007, to obtain the required

authorization. Based in part upon appellant’s averments in its complaint under ASBCA No. 55464, ¶ 2, that appellant “was no longer an operating company,” the Board also ordered that “the parties should be prepared to address, on 2 March 2007, appellant’s status as a legally viable corporate entity under state law for purpose of its ability to maintain and pursue its claims as a government contractor before the Board.” (Bd. corr. mem. preh. conf. dtd. 17 January 2007)

During a telephone prehearing conference on 2 March 2007, the parties advised the Board, in pertinent part, as follows:

Appellant’s counsel represented that appellant’s corporate charter has been suspended, but contends that it may still maintain this action in the context of winding up its affairs under California law. Counsel also stated that it still has not received authority to commit to a schedule for further proceedings and does not know, when, or if, such authority will be forthcoming.

The government offered no views on these matters, since government counsel had just been made aware of them. The government indicated that it would study these developments and would consider filing a motion to dismiss the appeals in the near future.

(Bd. corr. mem. preh. conf. dtd. 7 March 2007)

The government filed the subject motion to dismiss on 26 April 2007. Appellant obtained new counsel to respond to the government’s motion.

The government’s motion contains exhibits showing that a number of tax liens were entered against appellant in the County Court of Santa Barbara, CA between 2002 and 2004, as follows:

County Tax Lien	\$8,107	11/25/02
County Tax Lien	\$5,128	11/25/02
County Tax Lien	\$6,946	11/25/02
County Tax Lien	\$9,993	10/01/04
IRS Tax Lien	\$271,036	05/19/04
State Tax Lien	\$47,032	06/15/04

(govt. mot., exs. 1-4)

Appellant does not dispute these liens. According to appellant, its failure to pay these taxes was caused by an improper suspension from contracting by the Department of the Air Force during the performance of this task order and also by various government actions and inactions under this contract and task order. (Opp'n at 1-3)

The government's motion also contains an exhibit showing that VEI was suspended as a corporation by the California Secretary of State on 21 July 2004, and by the California Franchise Tax Board on 1 February 2005 (govt. mot., ex. 5). Appellant does not dispute these suspensions. As far as the record shows, appellant remains a suspended corporation under California law.

DECISION

It is well settled that a corporation's capacity to initiate or maintain litigation at the Board is determined by the law of the state of its incorporation, in this case, the State of California. *DCO Construction, Inc.*, ASBCA Nos. 52701, 52746, 02-1 BCA ¶ 31,851 at 157,403. Appellant contends that under California law it had the status of a voluntarily dissolved corporation as of 2003 and as such, it had the capacity to wind up its affairs, including the filing of these claims and the prosecution of these appeals. Corporations Code, § 2001. However under California law a corporation generally must file a certificate with the State evidencing its election to dissolve, Corporations Code, § 1901(a), and appellant has failed to provide us with this certificate. It is unclear whether appellant's claimed dissolution complied with California law.

Assuming that appellant's claimed dissolution complied with California law, it is undisputed that the California Secretary of State suspended appellant on 21 July 2004 and the California Franchise Tax Board suspended appellant on 1 February 2005. Under California law, a suspended corporation may not file suit or defend a lawsuit while its taxes remain unpaid. *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, 136 Cal. App. 4th 212, 217-218 (2006); *Mather Construction Co. v. United States*, 475 F.2d 1152, 1155 (Ct. Cl. 1973). In support of its position, VEI cites *International Crane Co.*, ASBCA No. 49604, 00-1 BCA ¶ 30,624, *recons. den.*, 00-2 BCA ¶ 31,085, where we held that a contractor with a forfeited Charter was allowed to prosecute a Board appeal, as part of the wind up of its affairs, when its claim was filed prior to forfeiture. However this case involved a corporation's capacity under Maryland law, which has no application here.

While California law provides that a suspended corporation may obtain reinstatement by virtue of a "certificate of revivor," Cal. Rev. & Tax Code § 23305, appellant has not tendered such a certificate, nor does it indicate that it has applied for such a certificate, nor has it sought a reasonable continuance to request such a certificate.

With respect to appellant's later claim under ASBCA No. 55464, appellant was clearly a suspended corporation at the time it submitted the certified claim to the CO for decision and at the time it took its appeal to this Board, and thus lacked the capacity to proceed. With respect to ASBCA No. 54939, appellant was not suspended when it certified its claim to the CO for decision in April 2004, but was suspended by the time it filed its notice of appeal, in late February 2005. Assuming that appellant's "initiation" of the legal action began when it filed the notice of appeal, appellant lacked the capacity to file this appeal. Alternatively, assuming that appellant's "initiation" of the legal action began when it filed its certified claim for decision to the CO, we are of the view, based upon California law, that a corporation lacks the capacity to maintain and prosecute an otherwise proper legal action once it has been suspended. This very point was addressed by the Court of Claims, under California law, in *Mather Construction* at 1155:

Finally, it is observed that plaintiff D & L was suspended for nonpayment of taxes on December 1, 1969, approximately 20 days after its petition was filed. D & L, therefore, had capacity at the time the action was commenced. *Capacity, however, is not only the power to bring an action, but is also the power to maintain it.* Corporate suspension, rather than precipitating the "death" of the corporation, renders the corporation powerless or "incompetent" to perform certain acts. Just as an individual who is rendered incompetent in the course of a trial may not proceed without substitution (see Rule 66(b)), *incapacity of a corporation will render it powerless to proceed* and therefore may be raised as a defense at any time prior to final judgment.

(Emphasis added) *Accord Weststar Revivor, Inc. (formerly Weststar, Inc.)*, ASBCA Nos. 52837, 53171, 06-1 BCA ¶ 33,288 at 165,031, n. 1, *aff'd*, 228 Fed. Appx. 1002 (Fed. Cir. 2007) (California corporation suspended while prosecuting Board appeals did not have capacity to maintain appeals absent certificate of revivor).

CONCLUSION

We conclude that appellant, a suspended corporation under California law, does not have the capacity to maintain and prosecute these appeals before the Board. We grant the government's motion to dismiss the appeals for lack of jurisdiction. The appeals are dismissed.*

* Based on our conclusion, we need not address the other grounds for dismissal asserted by the government.

Dated: 21 February 2008

JACK DELMAN
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 Nos. 54939, 55464, Appeals of Valenzuela Engineering, Inc., rendered in conformance with the Board's Charter.

Dated:

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