



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR SUMMARY RELIEF AND TO DISMISS DENIED: July 16, 2007

CBCA 52

TAS GROUP, INC.,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Carolyn Callaway, Albuquerque, NM, counsel for Appellant.

Timothy P. McIlmail, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **STERN**, **FENNESSY**, and **SOMERS**.

SOMERS, Board Judge.

This appeal involves a claim by the TAS Group, Inc. (TAS) against the United States Marshals Service (USMS), Department of Justice, on behalf of its subcontractor, CSI Aviation Services, Inc. (CSI or subcontractor), for damages to the engine of an aircraft allegedly caused by the negligent conduct of the USMS pilots. We have before us three motions filed by the Government.

In the first motion, the Government seeks summary relief on the grounds that the "Government Liability" clause, which provides for a limited waiver of government liability, could not apply because the clause only covers property owned by the prime contractor, and, in this case, the subcontractor owned the damaged property. In the second, the Government has moved for summary relief, contending that the claim should be dismissed because the

allegedly negligent actions occurred in Honduras. The Government asserts that the contractor's sole remedy arises under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), which does not apply to claims arising in a foreign country. *Id.* § 2680(k). Third, the Government moves to dismiss the claim for lack of jurisdiction because TAS dissolved as a corporate entity on May 6, 2006, and does not have the capacity to continue this litigation. Not surprisingly, the appellant opposes these motions. We address each motion in turn.

I. Government Liability for Injury to Subcontractor's Equipment

On June 1, 1999, TAS and the Department of Justice entered into a contract requiring TAS to provide passenger aircraft for use by the USMS. A clause in the contract entitled "Government Liability" states:

The Government shall not be held liable for any injury to the Contractor's property unless such injury or damage is due to negligence on the part of the Government and is recoverable under the Federal Tort Claims Act, or pursuant to other Federal Statutory Authority.

Appeal File, Exhibit 9 at 181. The Government contends that under the plain language of the clause, the Government is only liable for damages to the prime contractor's property. Noting that other clauses in the contract, such as the "Hold Harmless and Indemnification Agreement" clause,¹ distinguish between the contractor's property and property owned by a third person, the Government concludes that the contract must be interpreted so that reference to the contractor's property excludes reference to a third party's property unless explicitly spelled out. In this case, the Government argues that because the subcontractor, a third party, owned the leased aircraft, the Government can not be held liable for any damages to the aircraft.

¹ The Hold Harmless and Indemnification Agreement clause provides that "[t]he Contractor shall save and hold harmless and indemnify the Government against any and all liability claims and costs of any person or persons, and for loss or damage to any Contractor property or property owned by a third party, occurring in connection with or in any way incident to or arising out of the occupancy, use, service, operation, or performance of work under the terms of this contract, resulting in whole or in part from the negligent acts or negligent omissions of the Contractor, any subcontractor, or any employee, agent, or representative of the Contractor or subcontractor." Appeal File, Exhibit 9 at 180.

It is well established that subcontractors may pursue claims against the Government on sponsorship of the prime contractor. The Government's liability can arise under its contract with the prime contractor, the terms of which have been passed onto subcontractors, where the subcontractor's performance is impacted by the actions or inactions of Government agents. See *United States v. Spearin*, 248 U.S. 132 (1918); *United States v. Turner Construction Co.*, 827 F.2d 1554 (Fed. Cir. 1987), *aff'g* ASBCA 25714, 86-1 BCA ¶ 18,532 (1985). In this case, appellant alleges that the Government's negligent actions damaged one of the aircraft's engines, impairing the subcontractor's ability to perform the contract.

In evaluating the contract between TAS and the Government, we note that the contract uses the term "contractor" when setting forth the requirements under the contract. For example, the contract states that "the Contractor shall provide a rental aircraft . . ." Appeal File, Exhibit 9 at 172 (subsection entitled "Basic Ordering Agreement (BOA)"). It notes that "the Contractor maintains total responsibility for Aircraft Maintenance." *Id.* at 175. Despite that language, the Government and TAS understood that CSI, as subcontractor, would fulfill the work of TAS in key elements of the contract. For example, the Government knew that the subcontractor would be providing the aircraft and would be responsible for aircraft maintenance because the Government requested permission to contact the subcontractor directly on matters of daily aircraft operations. See Appellant's Opposition to Respondent's Second Motion for Summary Judgment, Attachment 1. Additionally, the Government's actions reflected its knowledge that CSI would be fulfilling the requirements of the contract that had been designated for the contractor. Indeed, consistent with that belief, the Government accepted responsibility for some of the damages claimed by CSI and paid CSI \$267,098. Appeal File, Exhibit 7 at 68.

We reject the Government's theory that the term "contractor" as used in the Government Liability clause should be interpreted as referring only to the prime contractor. The contract does not distinguish between the prime contractor and the subcontractor. The terms of the contract and the actions of the parties support the conclusion that the term "subcontractor" is subsumed within the term "contractor" for the purpose of the requirements of the contract. Accordingly, we find that the Government actions could lead to liability to the subcontractor as well as to the prime. We deny the Government's first motion for summary relief.

II. Government Liability for Tortious Conduct Under Contract

As noted above, the contract contains a Government Liability clause that expressly limits the Government's liability for damages "due to negligence on the part of the Government and is recoverable under the Federal Tort Claims Act or pursuant to other Federal Statutory Authority." Appeal File, Exhibit 9 at 181. The Government seeks

summary relief on the ground that the FTCA does not apply to claims arising in a foreign country. Because appellant's claim seeks compensation for engine damage that occurred in a foreign country, the Government concludes that appellant's claim is not compensable under the FTCA.

The Government's argument ignores the fact that the Government Liability clause waives liability for damages due to negligence on the part of the Government that are recoverable under the FTCA or "pursuant to other federal statutory authority." In this case, the relevant "other federal statutory authority" that applies is the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (CDA).

Under the provisions of the CDA, the Board "shall have jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency (other than the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Rate Commission, or the Tennessee Valley Authority) relative to a contract made by that agency . . . [and] the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims." 41 U.S.C.A § 607(d) (2006). The Board, like the Court of Federal Claims, possesses jurisdiction pursuant to the CDA over claims of tortious breach of contract. As the Department of Transportation Board of Contract Appeals has noted,

Where the "tortious" act is a violation by the government of its expressed or implied promises under a contract, then an action lies under the statutes waiving sovereign immunity in contract claims disputes (Tucker Act and Contract Disputes Act) rather than those waiving immunity from tort claims (*e.g.*, Federal Tort Claims Act). *Woodbury v. United States*, 313 F.2d 291, 296-297 (9th Cir. 1963); *Wood v. United States*, 961 F.2d 195 (Fed. Cir. 1992). "Even though . . . a breach of contract action and tort action can co-exist, it is settled that claims essentially based upon an alleged failure to carry out contractual duties are not tort claims which confer jurisdiction under the FTCA. . . . *Tannenbaum v. Envirodyne Engineers, Inc.*, 609 F. Supp. 931, 933 (D. Ill. 1985)." *Coffey v. United States*, 626 F. Supp. 1246, 1248 (D. Kans. 1986). . . .

. . . If the nature of the action is that the defending party breached its expressed or implied contractual obligations, or that it so acted as to come within some clause of the contract

entitling the contractor to an equitable adjustment, then the action sounds in contract and may be maintained under the Contract Disputes Act before the Board.

HK Contractors, Inc., DOT BCA 2766, 96-1 BCA ¶ 28,175, at 140,645-46. Thus, there must be a direct connection between the Government's contractual obligations and the alleged tortious conduct. "It is not jurisdictionally sufficient if the alleged tortious conduct is merely 'related' in some general sense to the contractual relationship between the parties." *Weaver Construction Co.*, DOT BCA 2034, 91-2 BCA ¶ 23,800, at 119,184 (1990) (quoting *Silangan Manpower Services*, ASBCA 35304, 88-2 BCA ¶ 20,554); see also *H.H.O., Inc. v. United States*, 7 Cl. Ct. 703, 706-07 (1985).

The contract states that USMS pilots will fly the aircraft and that these pilots are type-rated to fly all of the aircraft listed. Appeal File, Exhibit 9 at 173. By requiring type-rated pilots, the contract clearly contemplated that the pilots would be capable and competent to operate the leased aircraft.

Appellant alleges that the USMS government pilots "negligently failed to follow procedures for monitoring engine start and shutting down an engine This failure caused severe damage to the engine and rendered it inoperative." Complaint ¶ 9. We find that the Government had an implied contractual duty to follow the correct procedures in operating the leased aircraft. Although we do not opine whether the Government pilots failed, in fact, to fulfill the duty of following proper procedures in operating the aircraft, we find that the existence of an implied duty is a sufficient contractual obligation to provide CDA jurisdiction over the alleged breach of that duty. Accordingly, the Government's motion for summary relief is denied.

III. Capacity to Continue Appeal as a Dissolved Corporation

In the third motion, the Government has moved to dismiss for lack of jurisdiction on the grounds that TAS lacked the capacity to continue this appeal because TAS has become a dissolved corporation. Appellant disagrees and contends that despite the dissolution of the corporation, which occurred after this appeal had been filed, TAS retains the capacity to continue the appeal. The facts related to the dissolution of the corporation follow.

TAS was incorporated pursuant to the laws of Missouri on May 6, 1988. Motion to Dismiss, app. 1. On March 25, 2005, TAS sponsored a claim from CSI to the contracting officer. Appeal File, Exhibit 4 at 9. The contracting officer denied the claim on July 15, 2005. *Id.*, Exhibit 3 at 5. TAS filed this appeal on September 9, 2005. *Id.*, Exhibit 1 at 1.

On January 5, 2006, Jonathan Tasler, one of the two shareholders of TAS, filed a petition for dissolution, *Tasler v. Green*, No. 06-AE-CV00017, in the Circuit Court of Platte County, Missouri. The two shareholders, Tasler and Kenneth L. Green, III., each owned 50% of the corporation. Opposition to Motion to Dismiss, Attachment 1. Missouri statutes provide specific procedures for the discontinuation of corporations “having only two shareholders each of which own fifty percent of the stock therein.” Mo. Rev. Stat. § 351.467(1) (1990). In cases where the two shareholders

are unable to agree upon the desirability of continuing the business of such corporation, either stockholder may file . . . a petition stating that it desires to discontinue the business of such corporation and dispose of the assets used in such business in accordance with a plan to be agreed upon by both stockholders or that, if no such plan shall be agreed upon by both stockholders, the corporation be dissolved.

Id. If the stockholders cannot agree upon a plan within certain time limits, the court “shall dissolve such corporation” and appoint a receiver to “administer and wind up its affairs.” *Id.* § 351.467(2).

Here, when the two stockholders failed to agree on a dissolution plan, the court entered an order on May 4, 2006, dissolving the corporation and appointing a receiver. Motion to Dismiss, app. 7, ¶ 1. The two shareholders subsequently agreed to settle their claims and the receiver proceeded with the liquidation. *Id.*, app. 11. The parties filed a motion entitled “Stipulated Motion for Approval of the Settlement, Liquidation, and Winding-Up of TAS Group, Inc. and to Close the Receivership,” and a “Joint Stipulation of Dismissal with Prejudice” on August 8, 2006. Opposition to Motion to Dismiss, Attachment 2. The motion stated that “[t]he parties have reached a settlement of all claims and counterclaims in this matter including all derivative claims asserted on behalf of TAS” and sought “an Order approving the settlement, liquidation, and winding-up of TAS Group, Inc., and to close the receivership.” *Id.*, app. 11. Representatives for Tasler and Green, the only parties to the litigation, signed the joint stipulation. Neither the USMS nor CSI participated as a party to the *Tasler v. Green* litigation.

The capacity of a corporation to maintain an action is determined by the laws of the state under which it was organized. *See P.I.O. GmbH und Ingenieurplanung v. International Broadcasting Bureau*, GSBCA 15934-IBB, 04-1 BCA ¶ 32,592, at 161,241 (citing *Talasila, Inc. v. United States*, 240 F.3d 1064, 1066 (Fed. Cir. 2001); *P.A.L. Systems Co.*, GSBCA 10858, 91-3 BCA ¶ 24,259); *see also* Federal Rule of Civil Procedure 17(b): “[t]he capacity of a corporation to sue or be sued shall be determined by the law under which it was

organized.” *P.A.L. Systems*, 91-3 BCA at 21,286. In most corporate jurisdictions a corporate survival statute will operate to permit a dissolved or liquidated corporation to participate in litigation for some period of time after dissolution. *Id.*, 91-3 BCA at 121,286-87.

Under Missouri law, a corporation administratively dissolved continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs. *See Reben v. Wilson*, 861 S.W.2d 171, 176 (Mo. App. E.D. 1993); Mo. Rev. Stat. § 351.486. The dissolution does not prevent commencement of a proceeding in its corporate name, or abate or suspend a proceeding originating prior to the effective date of the dissolution. *Reben*, 861 S.W.2d at 176 (citing Mo. Rev. Stat. § 351.476.2). As the Missouri Court of Appeals stated in *Gunter v. Bono*, 914 S.W.2d 437 (Mo. App. E.D. 1996):

Section 351.476(2)(5) . . . , enacted in 1990, states that “dissolution of a corporation does not prevent commencement of a proceeding by or against the corporation in its corporate name.” Absence of mandatory language notwithstanding, we have no trouble in concluding that the legislature’s intent in passing this statute was to prescribe the correct procedure for litigation involving dissolved corporations. This interpretation accords with the relevant precedents. *Mabin Construction Co., Inc. v. Historic Constructors, Inc.*, 851 S.W.2d 98, 103 (Mo. App. W.D. 1993); *Reben v. Wilson*, 861 S.W.2d 171, 176 (Mo. App. E.D. 1993).

Id. at 439-40.

Here, the Government states that a dissolved corporation may continue pending litigation pursuant to Missouri Revised Statute § 351.476(1) only as part of the winding up of its business. Thus, the Government concludes that TAS lost the ability to continue this appeal once the court-appointed receiver had wound up TAS’s business affairs. Appellant responds that, although TAS has been dissolved as a corporate entity, the dissolution did not impact TAS’s ability to continue the appeal.

First, the Government’s conclusion that the winding up of the corporation by the receiver extinguished this litigation is inconsistent with the Missouri statute explicitly stating that dissolution does not abate or suspend a proceeding pending by or against the corporation on the effective date of the dissolution. The Missouri statute does not specify what it means to “wind up” a corporation; however, other sources have defined “winding up” as “the process of settling the accounts and liquidating the assets of a corporation for the purpose of distributing net assets to shareholders and dissolving the corporation,” 19 C.J.S. Corporations

§ 958 (2007); *see also* 59A Am. Jur. 2d Partnership § 702 (2007) (“the means of winding up . . . is an accounting, generally followed by a liquidation of partnership assets, or reducing partnership assets to cash, paying creditors, and distributing to partners the value of their respective interests, as well as the performance of existing contracts”); *Shorter College v. Baptist Convention of Georgia*, 614 S.E.2d 37, 38 (2005) (“Liquidation of a corporation has been defined to mean the winding up of the affairs of the corporation by reducing its assets, paying its debts, and apportioning the profit or loss. A distribution of all assets is a ‘winding-up of the affairs’ of the corporation and is synonymous with ‘liquidation.’”). None of these definitions suggest that the existing litigation is terminated upon the dissolution of the corporate entity through the process of “winding up.” Nor does such a result make sense in light of the fact that a corporation may pay off liabilities and distribute remaining assets to its shareholders even though there are outstanding contingencies. *See, e.g., Gunter*, 914 S.W.2d at 441 (corporation could sue on a debt thirteen years after dissolution when the debtors defaulted on payment eleven years after dissolution).

The claim that gives rise to this appeal potentially represents a corporate asset should appellant prevail on the merits. The fact that the asset may ultimately go to the subcontractor, CSI, pursuant to the terms of the subcontract does not change the fact that the claim is a corporate asset. In addition, for the reasons explained in our decision on the Government’s first motion for summary judgment, TAS is expressly obligated under the subcontract with CSI to pursue all claims for equitable adjustment and/or other financial claims related to the contract on behalf of CSI to the maximum extent possible. Accordingly, should TAS fail to pursue the claims of CSI, TAS could be potentially liable to CSI for breach of the subcontract. Therefore, we find that under Missouri law, TAS, as a dissolved corporation, retains the capacity to sue and to be sued. The motion to dismiss for lack of jurisdiction is denied.

Decision

____ Respondent’s **MOTIONS FOR SUMMARY RELIEF AND TO DISMISS** are **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

JAMES L. STERN
Board Judge

EILEEN P. FENNESSY
Board Judge