



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-175485

July 3, 1973

Davidson, Brantman and Schwartz
The Westminster Building
110 South Dearborn Street - Suite 1020
Chicago, Illinois 60603

Attention: David Davidson, Esquire

BEST DOCUMENT AVAILABLE

Gentlemen:

We refer to your letter dated November 14, 1972 and subsequent correspondence written on behalf of the O'Brien Machine Company in which you request that the withholding of sums due your client under various contracts be stopped and that your client be paid for all sums properly invoiced by him for materials delivered.

The following facts as reported by the Defense Supply Agency, and which do not appear to be in dispute, serve as relevant background information for consideration of this case.

On October 20, 1967, George C. O'Brien and the O'Brien Gear and Machine Company were suspended from contracting with the Department of Defense for three years by the Defense Supply Agency (DSA) upon receipt of information that O'Brien Gear and Machine Company had furnished the Government a falsified certificate of testing in the performance of a government contract. Subsequently, a fifteen count indictment was returned against O'Brien and O'Brien Gear and Machine Company on January 30, 1969, in the U. S. District Court for the Northern District of Illinois, Eastern Division. To protect the interest of the Government, funds due O'Brien Gear and Machine Company were withheld by DSA and the Military Departments.

On January 19, 1972, the Renegotiation Board entered an order determining that O'Brien Gear and Machine Company realized excessive profits in the amount of \$250,000.00 for its fiscal year ending September 30, 1967. Pursuant to Section 103 of the Renegotiation Act of 1951, as amended, 50 U.S.C. App. 1218, O'Brien Gear and Machine Company filed a petition in the Court of Claims seeking a redetermination of the Renegotiation Board's Order (Ct. Cls. No. 105-72). On October 27, 1972, inasmuch as O'Brien Gear and Machine Company had not posted a bond to stay execution of the Board's order, judgment was entered in the Government's favor in the net amount of \$157,432.55 (the \$250,000.00 less a tax credit of \$92,567.45). It is in satisfaction of this judgment that the withholding in question was effected.

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In March of 1972, the O'Brien Machine Company was established and a charter issued by the State of Illinois. This company successfully bid on various prime contracts with the Federal Government. These contracts were apparently completed, and the O'Brien Machine Company submitted invoices for payment to DCASR, Chicago. O'Brien Machine Company was informed, however, by Office of Counsel at DCASR, Chicago, that payments would not be made to that corporation and monies would be used as an offset against sums due and owing to the United States by the O'Brien Gear and Machine Company.

You contend that the O'Brien Gear and Machine Company and the O'Brien Machine Company are distinct, separate, legal entities, and as such, funds owed by one may not be collected from the other. You state that while some court cases have permitted the corporate entity to be disregarded under certain circumstances, such as where the entity would present an obstacle to the due protection or enforcement of public or private rights, or where there is an attempt to avoid a clear legislative purpose, such circumstances are not present in this case. Additionally, you state that although legal entities have been generally disregarded where they are used as a cloak or cover for fraud or illegality, that no facts are set forth either to show fraud or illegality in the creation of the legal entity of O'Brien Machine Company as a distinct corporation. You thus maintain that the withholding of funds from O'Brien Machine Company for debts owed by O'Brien Gear and Machine Company is improper and illegal.

Based on the evidence submitted to this Office, it appears that both the O'Brien Gear and Machine Company and the O'Brien Machine Company are located at the same address, use the same machinery, have the same officers and are owned and controlled by the same person. In this respect, a precaward survey of O'Brien Machine Company dated July 25, 1972, determined that the bidder had manufactured similar items for the Government on previous contracts and that "O'Brien Machine Company was previously known as O'Brien Gear and Machine Company * * * [and] only the name of the company has been changed."

While the general rule, as you correctly point out, is that a corporation will be looked upon as a distinct legal entity, it is equally well settled, as you also acknowledge, that courts will look beyond a corporate entity whenever justice requires and will go behind such entity to determine an attempted evasion of Federal liability. See Palmolive Co. v. Conway, 43 F. 2d 226 (W.D. Wisc. 1930); B-92380, April 3, 1950; E-124032, March 28, 1956.

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The relationship of the two corporations in the instant case appears to be somewhat analogous to the situation considered in our decision B-16443, May 10, 1941. In that case we stated:

It would appear from the facts of record that both corporations were owned and operated by the Strawitz family, that the second corporation was organized in substitution for the first, and that the reason for dissolving the first corporation and organizing the second corporation may have been for the purpose of escaping legal accountability for obligations against the first corporation.

In such a case the courts have held that the legal fiction of corporate entity will be disregarded and action will be in accordance with existing facts. See 16 Comp. Gen. 12, and the decisions therein cited.

In view of the facts of record, we believe that the action taken by the Defense Supply Agency in offsetting funds owed the O'Brien Machine Company against debts of the O'Brien Gear and Machine Company is proper, and therefore should be affirmed.

Sincerely yours,

PAUL G. DEWELING
For the Comptroller General
of the United States

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