

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Laumann Manufacturing Corporation) ASBCA No. 50246
)
Under Contract No. DAAA08-96-C-0015)

APPEARANCE FOR THE APPELLANT: Norman A. Steiger, Esq.
Goldberg & Connolly
Rockville Centre, NY

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ Ralph J. Tremaglio, III, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE YOUNGER ON APPELLANT'S
MOTION FOR RECONSIDERATION OF BOARD'S DENIAL OF APPELLANT'S
MOTION FOR DISMISSAL WITHOUT PREJUDICE UNDER RULE 30

Appellant has moved for reconsideration of our 3 May 2001 decision denying its motion to dismiss without prejudice under Rule 30. Familiarity with our previous decision is assumed. We grant the motion, vacate our previous decision, and dismiss the appeal under Rule 30.

In moving for reconsideration, appellant apologizes that “it did not present sufficient facts and evidence to support its [original] motion.” (Motion for Reconsideration of Board’s Denial of Appellant’s Motion for Dismissal Without Prejudice Under Rule 30 (Motion) at 1) In its present motion, appellant sets forth three issues: excusable delay in its contract to manufacture, test and deliver housing assemblies; the absence of an enforceable delivery schedule; and faulty Government testing. (Motion at 2) Appellant asserts that the first two issues are “not relevant to this Motion,” but that the third issue is “extremely relevant.” (*Id.*)

With respect to this third issue, appellant insists that it will prove “that the Government testing and inspection of the 30 Housing Assembly units was faulty based upon Appellant’s review of the Government’s test findings and results. Stated another way, Appellant did not deliver non-conforming Housing Assembly units to the Government.” (*Id.*) Appellant urges that the “clear nexus” between this issue and the pending grand jury investigation is that it planned to call Thomas Laumann [its president and general manager] as its principal witness “to testify that Appellant did not deliver non-conforming units.” (*Id.*) Mr. Laumann is said to be a target of the grand jury investigation and “will have no

recourse but to exercise his privilege against self incrimination . . . when confronted by the Respondent's cross examination." (*Id.* at 3) Appellant also alludes to further surgery for Mr. Laumann, which is said to be scheduled for August 2001. (*Id.*) As with the original motion, no supporting affidavit, documents or evidence of any kind accompanies the present motion.

While it did not oppose appellant's original motion, respondent now does so, contending that appellant has failed to provide "a minimal showing that there is a pending criminal case [or that] there are substantially similar issues, facts and witnesses." (Respondent's Response to Appellant's Motion for Reconsideration of the Board's Denial of Appellant's Motion for Dismissal Without Prejudice Under Rule 30 (Response) at 4) Respondent avers that "there is no immediate evidence that an indictment is imminent," noting that "the investigation dates back to 1996 with no definitive conclusion in sight." (*Id.* at 5) Respondent also insists that it will be prejudiced in an unspecified way by further delay. (*Id.*) Respondent attaches to its papers copies of an April 1998 search warrant to appellant from the United States District Court for the Eastern District of New York seeking materials regarding appellant's "[p]roduct testing and inspection" and records, equipment and policies related thereto, together with a grand jury subpoena from the United States District Court for the Eastern District of Pennsylvania, and related materials. (*Id.*, exh. 1) Respondent also attaches a 30 June 2000 letter to its counsel from an Assistant United States Attorney for the Eastern District of New York stating that "the transaction(s) at issue in [this appeal] are directly related to an ongoing criminal fraud grand jury investigation. It is anticipated that this investigation will conclude by February 2001." (*Id.*, exh. 2)

Neither party's submission provided current and definite information regarding the present status of the criminal investigation. Accordingly, the Board ordered respondent's counsel to obtain a statement from the United States Attorney's office regarding whether prosecution has been declined with respect to the contract at issue in this appeal and, if not, when a prosecutorial decision is anticipated. As a result, respondent has now filed and served a letter to its counsel dated 30 May 2001 from the United States Attorney's office for the Eastern District of Pennsylvania stating that this appeal:

and the transaction(s) at issue [herein] are directly related to an ongoing criminal fraud grand jury investigation. We have been involved in plea negotiations with the criminal defense attorneys. Within the last month, the defendants rejected our plea offer and we will now proceed to conclude our grand jury investigation and present criminal charges to the Grand Jury within the next six to eight months.

Given the record as it now exists, we have reconsidered our previous decision. On the present record, similarity of issues has been established at least to the extent that the

criminal investigation relates to this contract and to appellant's "[p]roduct testing and inspection," as the subpoena indicates. In its answer in this appeal, respondent avers that its representatives rejected 34 of appellant's housing assemblies "because of numerous deficiencies including, but not limited to, missing or incorrectly sized holes, improperly installed seals, and gross deviations from the dimensions specified in the [technical data package]." (Respondent's Answer, ¶ 57) In addition, the record now establishes that the threat of prosecution is real, and that one of appellant's two witnesses in this appeal - its president and general manager - is likely to invoke his privilege against self-incrimination. Moreover, while it now opposes appellant's motion, respondent has advanced only a conclusory assertion of prejudice to it from delay. Considering these factors together and balancing "the interest of the appellant in postponement, which is strong, against the possible prejudice to [respondent] by way of important evidence that will be lost over time," *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1206 (Fed. Cir. 1987), we conclude that proceeding with trial later this month is not warranted.

There remains the question of whether to stay or to dismiss without prejudice under Rule 30. From the present representations of the United States Attorney's office, it appears that an indictment will not be forthcoming for "six to eight months," and a trial date and possible appeals foreseeably will extend the conclusion of the criminal proceedings well beyond that time. In the formulation of Rule 30, the course of those events both is "not within the control of the Board" and "may continue[] for an inordinate length of time." Hence, we conclude that dismissal without prejudice under Rule 30 is warranted.

Appellant's motion for reconsideration is granted and, upon reconsideration, our decision denying appellant's motion for dismissal without prejudice under Rule 30 is vacated. The appeal is dismissed under Rule 30 without prejudice to reinstatement within three years.

Dated: 4 June 2001

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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 No. 50246, Appeal of Laumann Manufacturing Corporation, rendered in conformance with the Board's Charter.

Dated:

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