

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
TechDyn Systems Corporation ) ASBCA No. 52243  
 )  
Under Contract No. DABT57-97-C-0003 )

APPEARANCES FOR THE APPELLANT: Thomas O. Mason, Esq.  
Rachel L. Semanchik, Esq.  
Williams Mullen  
McLean, VA

APPEARANCES FOR THE GOVERNMENT: COL Karl M. Ellcessor, III, JA  
Chief Trial Attorney  
CPT Richard M. Sudder, II, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICUS ON RESPONDENT'S MOTION  
TO DISMISS FOR FAILURE TO PROSECUTE

Respondent on 26 October 2004 moved to dismiss the above-captioned appeal, asserting that appellant has failed to prosecute the appeal. Appellant opposes respondent's assertion and seeks a joint status conference. We deny the motion.

Respondent would have us dismiss this appeal under Board Rules 31 and 35. Rule 31 permits the Board to issue an order to show cause why the appeal should not be dismissed when a party has failed to comply with a Board order, file documents, respond to correspondence or "indicates an intention not to continue." Rule 35 permits "such order as [the Board] considers necessary" when a party fails or refuses to obey a Board order. Respondent has not requested issuance of a show cause order. Neither has it cited a specific order with which appellant is currently not in compliance. Indeed, after the Board issued its 9 July 2004 Order directing the parties to consult and, within 10 days, present either a joint plan or separate plans for proceeding, it was respondent that informed the Board on 20 July 2004 that settlement discussions were taking place and that the parties would defer responding until after completion of those discussions. This was followed by a 13 August 2004 status report from respondent stating, "the parties have put a hold" on schedule discussions because of ongoing settlement discussions. The next correspondence was respondent's 26 October 2004 motion.

We treat appellant's opposition as though it were a response to a show cause order. Appellant's counsel has filed an affidavit with the opposition in which he advises

that appellant has made a settlement offer which respondent is currently considering and to which respondent's counsel has advised respondent intends to respond in the near future. Appellant's counsel states that appellant "regards this matter as still in the settlement process." (Mason aff. at 6-7) In its opposition, appellant requests a joint status conference (opp. at 12). Appellant's opposition and counsel's affidavit show good cause why the appeal should not be dismissed. Respondent's motion is denied.

Dated: 16 December 2004

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CARROLL C. DICUS, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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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. 52243, Appeal of TechDyn Systems Corporation, rendered in conformance with the Board's Charter.

Dated:

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