

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Sykes Communications, Inc.) ASBCA Nos. 53842 and 54077
)
Under Contract No. DASW01-99-C-0001)

APPEARANCE FOR THE APPELLANT: Jacqueline E. Chin Quee, Esq.
Brooklyn, NY

APPEARANCES FOR THE GOVERNMENT: COL Karl M. Ellcessor, III, JA
Chief Trial Attorney
CPT Peter G. Hartman, JA
Trial Attorney

Thomas B. Pender, Esq.
Chief Trial Attorney
Douglas R. Jacobson, Esq.
Trial Attorney
Defense Contract Management
Agency
Ft. Snelling, MN

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

On 8 July 2004 the government moved to dismiss the two captioned appeals for appellant's failure to prosecute. The Board ordered appellant to reply to the motion by 11 August 2004. On 18 August 2004 respondent renewed its motion to dismiss, asserting that appellant had failed to reply to the motion. On 20 August 2004 the Board received appellant's opposition to the motion, postmarked 18 August 2004.

STATEMENT OF FACTS

1. ASBCA No. 53842 arose from Sykes Communications, Inc.'s (Sykes) appeal from the 4 April 2002 final decision of the Administrative Contracting Officer (ACO) asserting a government claim of \$19,364 for indirect costs in fiscal year (FY) 1998 under the captioned contract that the ACO determined were unallowable.

2. ASBCA No. 54077 arose from Sykes' appeal from the CO's 22 October 2002 denial of Sykes' claim dated 13 August 2001 under the captioned contract.

3. Sykes took no appeal from the ACO's 18 June 2002 final decision asserting a government claim of \$567,575 under the captioned contract.

4. On 23 September 2003 the Board consolidated ASBCA Nos. 53842 and 54077 on appellant's motion.

5. On 29 September 2003 the Board ordered the parties within 60 days jointly to propose three hearing dates, a hearing location, and a discovery schedule. After repeatedly attempting to contact appellant's counsel to no avail, on 1 December 2003 respondent proposed such hearing and discovery dates to the Board.

6. On 24 December 2003 the Board ordered appellant to respond to the 29 September 2003 order within 21 days. After appellant called an ASBCA staff attorney on 30 January 2004, in a 4 February 2004 conference call appellant declined to propose hearing dates, asserting that the CO was about to issue another final decision under the captioned contract.

7. On 12 January 2004, respondent submitted its first discovery requests to appellant under the consolidated appeals.

8. On 14 June 2004 the Board received appellant's notice of appeal from the CO's 8 April 2004 final decision under the captioned contract, which appeal was docketed as ASBCA No. 54641.

9. The Board's 15 June 2004 scheduling order required appellant by 30 June 2004 to (i) respond to the government's January 2004 discovery request and (ii) submit to the Board a letter explaining how the Board has "jurisdiction to adjudicate amount(s) exceeding the contractor's claim of \$211,199.55 or \$461,199.55; [and] whether and how appellant timely appealed the CO's 18 June 2002 final decision."

10. Appellant did not submit the two foregoing documents to the Board by 30 June 2004. The jurisdictional explanation has not been submitted to date.

11. Respondent's 8 July 2004 motion to dismiss asserted that appellant was 121 days late in answering respondent's discovery request and violated the Board's 15 June 2004 order to submit its jurisdictional argument by 30 June 2004.

12. Appellant's letter postmarked 18 August 2004 enclosed its opposition to respondent's motion to dismiss and its responses to respondent's discovery requests of January 2004.

13. In a conference call on 26 August 2004, appellant's counsel stated that there were delays in receiving her legal fees for prosecuting these appeals, and she cannot handle these cases singlehandedly.

POSITIONS OF THE PARTIES

Movant argues that Board Rule 35 authorizes sanctions, including the "harsh and drastic sanction" of dismissal of these appeals, for a party's "willing delay or contumacious or contemptuous conduct," citing *Manshul Construction Corp.*, ASBCA Nos. 47795, 47797, 02-1 BCA ¶ 31,766 at 156,892, and that appellant's failure to comply with the Board's 15 June 2004 scheduling order warrants such a sanction.

Appellant states that "discovery . . . has been sporadic and there have been numerous delays . . . with the consent of the government" (opp'n at 2), but has provided no affidavit or other evidence of such government consent. Appellant argues that rather than "absolutely no activity," there have been multiple conference calls indicating appellant is actively interested in prosecuting its claims; missing discovery deadlines does not justify or require dismissal of the appeals; the government's failure to move to compel production or to strike (allegations) makes this motion to dismiss "improper," and appellant has now cured its delinquencies and violations, and has mooted the motion.

DECISION

The explanation of appellant's counsel for her failures to submit timely documents as the Board ordered does not show contumacious or contemptuous conduct sufficient to justify the drastic sanction of dismissal, especially since appellant's discovery response was submitted, albeit belatedly. The motion is denied.

Dated: 1 September 2004

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continue)

I concur

I concur

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

ROBERT T. PEACOCK
Administrative Judge
Acting 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. 53842 and 54077, Appeals of Sykes Communications, Inc., rendered in conformance with the Board's Charter.

Dated:

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