

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Government Therapy Services, Inc.) ASBCA No. 53972
)
Under Contract No. DAKF40-99-C-0080)

APPEARANCE FOR THE APPELLANT: Ms. Theresa Reyes
President

APPEARANCES FOR THE GOVERNMENT: COL Karl M. Ellcessor, III, JA
Chief Trial Attorney
MAJ Gregory R. Bockin, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON GOVERNMENT'S MOTION TO DISMISS FOR FAILURE TO PROSECUTE

The Board issued an order directing appellant to show cause why the appeal should not be dismissed for failure to prosecute, and the government filed a motion to dismiss for failure to prosecute under Board Rules 31 and 35. Appellant did not respond to either the show cause order or the government's motion. We conclude that, over a protracted period of time, appellant has failed to respond to communications from the government and the Board, has failed to respond to Board orders, and has failed to prosecute this appeal. Accordingly, we grant the government's motion and dismiss the appeal for failure to prosecute.

FINDINGS OF FACT

Appellant was awarded a commercial item contract, No. DAKF40-99-C-0080, by the Department of the Army, effective 1 April 1999, to provide occupational therapy services for students in grades pre-school through ninth at Fort Bragg, North Carolina, and in elementary school at Pope Air Force Base, North Carolina (R4, tab 1). On 19 August 2002, the contracting officer terminated the contract for cause under subparagraph (m), *Termination for cause*, of FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (APR 1998) (R4, tab 105). This appeal was timely filed on 11 October 2002 by Ms. Theresa Reyes, president of Government Therapy Services, Inc.

By a decision dated 9 July 2003, the Board struck appellant's claim for affirmative relief relating to wage determination adjustments, overtime, and unpaid interest on late

invoices, but retained jurisdiction over the propriety of the termination for cause. *Government Therapy Services, Inc.*, ASBCA No. 53972, 03-2 BCA ¶ 32,303 at 159,833.

The government represents that, during the course of this appeal, counsel of record and the paralegal assigned to the case made unsuccessful attempts to contact appellant by telephone (gov't mot. at 2). The government further represents that, on 28 October 2003, it submitted to appellant its first discovery request and that no response was ever received (*id.*, tab A).

On 16 January 2004, the Board issued an order directing the parties to confer and advise the Board, by 13 February 2004, how they wished to proceed with the appeal (*id.*, tab B). The government timely responded, but the copy of the order addressed to Ms. Reyes at appellant's address of record was returned as undeliverable. Efforts by the Board's administrative staff to reach appellant at the telephone number of record during the month of February 2004 were unsuccessful.

By an order dated 2 April 2004, the Board advised appellant that its 16 January 2004 order had been returned as undeliverable, enclosed another copy of that order and directed appellant to respond in writing not later than 16 April 2004 (*id.*, tab C). The order was sent by certified mail to Ms. Reyes at appellant's address of record, but again was returned to the Board as undeliverable.

On 27 April 2004, Ms. Reyes telephoned the Board's offices before regular business hours and left a voicemail message that included a request for the Board's FAX number. The telephone number that she provided in the voicemail message was not appellant's telephone number of record. On 28 April 2004, Ms. Reyes called the Board's offices again, this time requesting a copy of the Board's 9 July 2003 decision. A member of the Board's administrative staff advised Ms. Reyes that the Board had been unable to reach her and requested current telephone, FAX and address information. Ms. Reyes declined to provide the requested information. On 29 April 2004, a different member of the Board's administrative staff returned the call Ms. Reyes had placed on 27 April 2004 and left a voicemail message supplying the Board's FAX number. No further communication was received from appellant at that time.

On 7 May 2004, the government sent appellant a copy of its notice concerning assignment of new counsel to the case to appellant's address of record. The notice was returned as undeliverable (*id.*, tab D).

On 28 June 2004, a member of the Board's administrative staff again called the telephone number Ms. Reyes had provided on 27 April 2004, but was advised by the woman answering the telephone that the Board had the wrong telephone number. The Board's administrative staff member called the number again several minutes later and left a message on the answering machine advising that the Board's orders had been

returned as undeliverable, requesting that the new address information be provided, and advising that the appeal could be dismissed for failure to prosecute. Later that same day, the Board issued an order to show cause within 30 days why the appeal should not be dismissed for failure to prosecute (*id.*, tab E). Again, the order was sent by certified mail, and was returned as undeliverable.

On 29 June 2004, Ms. Reyes left a voicemail message with the Board's administrative staff indicating that she had resigned as appellant's president in May 2003, that the company had been dissolved, and that she was in Florida and would soon be leaving for three years in Latin America. She further indicated she would send a letter explaining why she had not responded to the Board's communications and orders, but has never done so.

On 27 August 2004, the government filed a motion to dismiss for failure to prosecute. On 30 August 2004, the Board sent a copy of the motion to appellant at the address of record by certified mail and directed appellant to respond not later than 27 September 2004. The motion was returned as undeliverable. No response to the government's motion has been filed.

DISCUSSION

Board Rule 31. Dismissal or Default for Failure to Prosecute or Defend provides:

Whenever a record discloses the failure of either party to file documents required by these rules, respond to notices or correspondence from the Board, comply with orders of the Board, or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may, in the case of a default by the appellant, issue an order to show cause why the appeal should not be dismissed or, in the case of a default by the Government, issue an order to show cause why the Board should not act thereon pursuant to Rule 35. If good cause is not shown, the Board may take appropriate action.

Board Rule 35. Sanctions provides:

If any party fails or refuses to obey an order issued by the Board, the Board may then make such order as it considers necessary to the just and expeditious conduct of the appeal.

We are certainly cognizant of the authority which holds that “[a] dismissal with prejudice for failure to prosecute is a harsh measure operating as an adjudication on the merits, and we employ it sparingly.” *Generator Technologies, Inc.*, ASBCA No. 53206, 03-1 BCA ¶ 32,058 at 158,461, *quoting David’s Econo-Move, Inc.*, ASBCA Nos. 49105, 49562, 00-1 BCA ¶ 30,621 at 151,156. Thus, where there is a lack of “meaningful effort” by appellant to continue with the prosecution of an appeal, the Board’s order to show cause is intended to give appellant the opportunity to explain the circumstances surrounding its failure to move the appeal forward before it is dismissed. *See Scorpio Piping Company*, ASBCA No. 34073, 89-2 BCA ¶ 21,813 at 109,764.

As is apparent from the recitation of facts, the appellant here has failed to comply with the Board’s discovery rules, has failed to answer written and telephonic communications from the government and the Board, and has repeatedly failed to respond to orders from the Board, including the Board’s 28 June 2004 order to show cause. Because appellant did not provide the Board with information regarding any changes of its corporate representative, telephone number and mailing address, most of the attempts by the government and the Board to reach appellant were fruitless.

The record in this case reflects a total lack of “meaningful effort” to prosecute this appeal. Moreover, the voicemail message left with the Board by appellant’s representative of record on 29 June 2004 leaves little doubt that appellant is not going to pursue its challenge to the termination. It is not surprising, therefore, that the Board’s show cause order and the government’s motion to dismiss for failure to prosecute were both returned to the Board as undeliverable. Under the circumstances, we conclude that a dismissal with prejudice under Board Rule 35 is an appropriate sanction.

CONCLUSION

The government’s motion is granted. The appeal is dismissed with prejudice under Board Rules 31 and 35.

Dated: 13 October 2004

CAROL N. PARK-CONROY
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. 53972, Appeal of Government Therapy Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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