

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Bruce E. Zoeller ) ASBCA No. 56578  
 )  
Under Contract No. DACA41-1-99-532 )

APPEARANCE FOR THE APPELLANT: Mr. Bruce E. Zoeller

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.  
Engineer Chief Trial Attorney  
William M. Edwards, Esq.  
Engineer Trial Attorney  
U.S. Army Engineer District,  
Kansas City

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON APPELLANT'S MOTIONS  
UNDER BOARD RULES 31 AND 35

In this appeal Mr. Bruce E. Zoeller (appellant) seeks damages resulting from the government's revocation/termination of his agricultural lease. During discovery, the Board ordered the government to produce certain documents requested by appellant. The government produced some but not all the documents subject to the Order. Appellant then filed "APPELLANT'S RULE 5 MOTIONS FOR RULE 31 DEFAULT JUDGEMENT [sic] AND RULE 35 SANCTIONS DUE TO 17 MAR 09 BOARD ORDERED RULE 15(C) PRODUCTION OF DOCUMENTS & NONRESPONSIVE RESPONDENT." The government filed in opposition to appellant's motions.

STATEMENT OF FACTS (SOF) PERTINENT TO MOTIONS

1. By letter dated 19 November 2008, appellant served the government with a request for production of documents in this appeal, requesting the following documents:

1. Family Housing Contract No. DACA41-02-C-0009
2. Any documents involved with the reassignment of outlease unit FW to Family Housing.
3. Any site selection reports, appraisals, real estate planning reports, real estate summaries [sic], easements requested or granted, and any related clearances or approvals involved with new Family Housing uses being placed on outlease unit FW lands.

4. Environmental Assessment for Family Housing Contract No. DACA41-02-C-0009
5. Notice of Intent for Family Housing Contract No. DACA41-02-C-0009
6. Environmental Impact Statement for Family Housing- DACA41-02-C-0009
7. ENGF 909 & 903 Prelim./Certificate of Title for Family Housing - DACA41-02-C-0009
8. ENGF 2803-R Rights of Entry for Construction for Contract No. DACA41-02-C-0009
9. Uniform Relocation Act Report for Family Housing Contract No. DACA41-02-0009

2. On 2 January 2009, the government served its response on appellant, objecting to each request on the grounds of relevance. On 12 January 2009, appellant filed a motion to compel production of the documents. The government responded on 29 January 2009, reiterating its position that all the discovery requests were irrelevant.

3. By order dated 17 March 2009, the Board stated, insofar as pertinent, that “we cannot say that the documents requested by appellant above are irrelevant to the claims it has asserted before this Board or are not reasonably calculated to lead to the discovery of admissible evidence related to these claims.” The Board granted appellant’s motion and ordered the government to produce all the documents listed by appellant, no later than 30 days from the date of the order.

4. On 15 April 2009, government counsel filed a Statement of Compliance (“SOC”) with the Board’s 17 March 2009 order. Insofar as pertinent, the government’s SOC stated as follows:

- (1) The entire contract (939 pages) will be produced except that the price and technical proposals will be withheld.
- (2) Respondent did not find any responsive documents.
- (3) Respondent did not find any responsive documents.
- (4) Respondent did not find any responsive documents.
- (5) Respondent did not find any responsive documents.
- (6) Respondent did not find any responsive documents.

- (7) Respondent did not find any responsive documents.
- (8) Respondent did not find any responsive documents.
- (9) Respondent did not find any responsive documents.

It should be noted that the records custodians have advised Respondent's counsel that most of the requests are for documents that are not normally prepared for construction contracts in the nature of DACA41-02-C-0009. Therefore, the absence of some of these documents in the record is not unusual.

5. By letter dated 14 December 2009, appellant filed the subject motions for default judgment and sanctions related to the government's SOC. Appellant contended, *inter alia*, that the price and technical proposals under the Family Housing Contract, which were withheld by the government under item (1) above, are materially relevant and it was wrongful to withhold them. Appellant contended that the government's SOC "fails to delineate its possible 'agents' advisors, superiors, or successors' third-party authorized government record custodian names, titles, authorizations and addresses and in so doing continues its discovery non-divulgence" (mots. at 3 of 10) (footnote omitted) (emphasis in original). Appellant contended that the SOC's "[u]se of the words "most" and "some" in repudiating statements disguise their true countermanding nature as factual admissions, being, a few mandatory, sought, relevant and material government documents are hence required, thus prepared and so normally filed by records custodians 'for construction contracts in the nature of DACA41-02-C-0009' and therefore are producible [sic]" (*id.* at 4 of 10) (footnotes omitted) (emphasis in original).

6. Appellant's motions sought relief as follows:

Case record discloses express and implied default failure of government, record custodians and authorized agents to prepare, file and produce relevant documents. Default in production of sought documents clearly mandated by express contract, statutory scheme due process and compelled by administrative agency regulatory civil order. The government has also defaulted in its duty to cooperatively respond to notices from the appellant for production of sought material documents under ASBCA Rule. Furthermore, because the government has failed to comply with the Board's 17 MAR 09 Order to produce sought relevant factual material documents the *appellant moreover specifically requests*

*Board issued an ASBCA Rule 31 order that in good faith and fair play the government show good causes for such ASBCA Rule 15(c) default. If good cause is not shown for failure to produce material documents, the appellant specifically requests an ASBCA Rule 31 Board ordered default judgment with prejudice against the government as appropriate action thereon. In regards to the government's non-responsive document omissions appellant moreover requests applicable Board ordered sanctions pursuant to ASBCA Rule 35 which appellant believes were once avertable [sic] in advance of the government's defaults in prosecutions of interconnected mandatory procedures but now, due to such defaults, consequentially are necessary to the just and expeditious conduct of the appeal.*

(Mots. at 8, 9 of 10) (Emphasis added)

7. By order dated 28 January 2010, the Board ordered the government to “more clearly and specifically address the efforts it has undertaken to comply with the Board’s 17 March 2009 order.” The government responded on 2 February 2010, providing, *inter alia*, the names of persons contacted and their responses.

8. By letter to the Board dated 11 February 2010, appellant reiterated its request for default judgment and sanctions, contending that the government concealed and spoliated the requested documents, and that its failure to comply with the Board’s discovery order constituted bad faith.

9. Pursuant to Board order dated 10 March 2010, the Board directed that the contracting officer (CO) file an affidavit attesting to the search for the ordered documents. On 6 April 2010, the CO filed a declaration under penalty of perjury stating that he had commissioned a new search and that some additional documents had been located, which would be reviewed and submitted to appellant if responsive to the Board’s order. As a result of a telephone conference on 26 April 2010, the Board ordered the CO to issue a status report and certify under oath or declaration that the government’s search was finally completed and that any responsive documents were made available to the appellant. The CO did so by declaration dated 24 May 2010, identifying additional documents sent to appellant.

10. By letter to the Board dated 15 July 2010, appellant stated, *inter alia*, that the government still had not provided the documents appellant had sought and that were subject to the Board’s order, *i.e.*, items (2) through (9) (SOF ¶ 1); that the government’s conduct was willful and in bad faith and that the Board should sanction the government

and draw an adverse inference that the government withheld superior knowledge from appellant during the negotiation of the lease and thereby enter default judgment for appellant in the amount of its claim, \$313,245.60. The government responded on 2 August 2010, stating, *inter alia*, that it had searched for the subject documents but could not find them, and that appellant's allegations that documents were concealed and/or spoliated were unsupported and false.

### DECISION

Board Rule 31 provides as follows:

Rule 31. Dismissal or Default for Failure to Prosecute or Defend

*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 any 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.*

(Emphasis added) Our first task is to address whether the government failed to comply with the discovery order of the Board dated 17 March 2009.

With respect to the price and technical proposals under the family housing contract, which appellant contends the government wrongfully withheld under the Board's order, we note that appellant failed to specifically request this information in its 19 November 2008 discovery request and hence the Board did not specifically order these documents be provided. Appellant also did not specifically request and the Board did not specifically order the discovery of the identity of the government's record custodian names, titles, authorizations and addresses (*see* SOF ¶ 5). Appellant has not shown that the government materially violated the Board's order in this respect.

However on 17 March 2009, the Board did order that the documents listed in the order be produced no later than 30 days from the date of the order, or by 16 April 2009 (SOF ¶ 3). The government did not produce all these documents by 16 April 2009 as ordered by the Board, nor did it ask the Board for a reasonable time extension to do so.

Rather, the CO certified under oath that based upon new searches the government located additional responsive documents, which were shipped to appellant over a year later, on or after 24 May 2010. The government offers no persuasive explanation why these new searches were not conducted by or through the CO in response to the Board's order of 17 March 2009, or within a reasonable time thereafter. Absent such an explanation, we must conclude that the government's original search for documents in response to the Board's order was incomplete.

We conclude that the government failed to make all documents available to appellant within the time frame directed by the Board's order of 17 March 2009, and violated the Board's order in this respect. Appellant has established grounds for the issuance of a show cause order under Board Rule 31 requesting sanctions under Board Rule 35 for the failure to comply with a Board order (*see* below). However, appellant has already filed a motion for sanctions, and the issuance of a show cause order relating to sanctions would be duplicative and would serve no useful purpose. Accordingly, we deny appellant's motion for a show cause order under Board Rule 31 as duplicative, and we proceed to address appellant's motion for sanctions under Board Rule 35.

Board Rule 35. Sanctions, states as follows:

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

The Board retains considerable discretion in evaluating a motion for sanctions. We have stated: "Factors for consideration in the imposition of sanctions include the presence or absence of willfulness, the degree of prejudice to the parties, the delay, burden and expense incurred by the movant, and evidence of compliance with other Board orders." *Lockheed Martin Corp.*, ASBCA No. 45719, 99-1 BCA ¶ 30,312 at 149,884. We address these factors below.

Appellant has not shown that the government acted willfully to delay the subject discovery. Indeed, during a telephone conference on 26 April 2010, the government "expressed embarrassment over the finding of these additional materials and offered an apology for the lateness of their discovery." Appellant has not shown that the documents belatedly received caused any material prejudice to the presentation of its case, nor has it shown that the delay in receipt, albeit significant, caused appellant any undue burden or expense. Appellant also has not shown that the government's lack of compliance was part of a pattern of noncompliance with Board orders in this appeal. Based upon the foregoing, we conclude that appellant is not entitled to its requested sanctions for the delayed production of the documents ordered by the Board.

Appellant contends, however, that it has been materially prejudiced by the documents not produced by the government as ordered, *i.e.*, items (2) through (9) (SOF ¶ 1), which it believes are necessary to support its claim. The government has consistently maintained that it has been unable to find the documents. Appellant has not shown that the government concealed or wrongfully destroyed the documents. *See Grumman Aerospace Corp.*, ASBCA No. 46834 *et al.*, 03-1 BCA ¶ 32,203 at 159,262 n.13, *aff'd on recon.*, 03-2 BCA ¶ 32,289. *See McDonnell Douglas Helicopter Systems*, ASBCA No. 50341, 99-2 BCA ¶ 30,546 at 150,834 (no adverse inference drawn where no willful conduct or misconduct to hide or destroy workpapers). *See also Northrop Grumman Corp.*, ASBCA No. 52178 *et al.*, 03-2 BCA ¶ 32,278 at 159,704: “Sanctions have been found appropriate ‘if there is a showing of willfulness, bad faith, or fault on the part of the sanctioned party’ (citation omitted).” Appellant shows no such evidence here. As stated in *Dunn v. Trans World Airlines, Inc.*, 589 F.2d 408, 415 (9<sup>th</sup> Cir. 1978):

We find that the district judge did not abuse his discretion in not imposing any sanctions for plaintiff’s failure to produce medical records which were no longer in existence. Where the failure to comply with a discovery order is due to inability, and not to willfulness, bad faith, or any fault of a party, the claim of that party should not be dismissed. *Societe Internationale Pour Participations Industrielles Et Commerciales v. Rogers*, 357 U.S. 197, 212, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958).

### CONCLUSION

For reasons stated, appellant’s motion for a show cause order for sanctions under Board Rule 31 is denied as duplicative. With respect to appellant’s motion for sanctions under Board Rule 35, we conclude that appellant has not shown grounds to support a default judgment against the government, or to support an adverse inference amounting to an award of its claim or to any other sanction of similar severity for the government’s failure to comply with the Board’s order of 17 March 2009. Appellant’s motion for sanctions is denied.

Dated: 14 September 2010

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JACK DELMAN  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

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. 56578, Appeal of Bruce E. Zoeller, rendered in conformance with the Board's Charter.

Dated:

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