

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
)  
Vertex Construction & Engineering ) ASBCA Nos. 58989, 58990  
) 59635, 59646  
)  
Under Contract Nos. W56SGK-13-C-7047 )  
W56SGK-13-C-7048 )  
W56SGK-13-C-7050 )

APPEARANCE FOR THE APPELLANT: Mr. Hedayatullah Zaheb  
CEO/President

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.  
Army Chief Trial Attorney  
MAJ Cameron Edlefsen, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE YOUNGER  
ON THE GOVERNMENT'S MOTION TO DISMISS FOR FAILURE TO PROSECUTE

In these four appeals regarding three contracts to disassemble and reassemble relocatable buildings in Afghanistan, the government has moved to dismiss for failure to prosecute the appeals. We grant the motion and dismiss the appeals with prejudice.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

A. *The Contracts*

*Contract 7047: ASBCA Nos. 58989, 59635*

1. By date of 28 February 2013, the Regional Contracting Center–Capital in Kabul, Afghanistan (government) awarded appellant Vertex Construction & Engineering (Vertex) Contract No. W56SGK-13-C-7047 (contract 7047), to disassemble and reassemble flat pack container units in Afghanistan (notice of appeal at 2). Thereafter, by date of 14 August 2013, the contracting officer terminated contract 7047 for default (*id.*). By date of 1 November 2013, Vertex brought the appeal that we docketed as ASBCA No. 58989.

2. By date of 19 September 2014, the contracting officer denied Vertex's request for an equitable adjustment under contract 7047 (notice of appeal). Thereafter, by date of 20 October 2014, Vertex brought an appeal from that denial that we docketed as ASBCA No. 59635.

3. By order dated 18 November 2014, the Board directed the parties to provide their views on the impact, if any, of the Board's decision in *Vertex Construction & Engineering*, ASBCA No. 58988, 14-1 BCA ¶ 35,804, declaring contract 7048 (*see* statement 10) void *ab initio*. In response, the government moved to dismiss these two appeals, as well as a related appeal, ASBCA No. 58990 (*see* statement 15), for failure to state a claim upon which relief can be granted.

4. By order dated 29 December 2014, we directed appellant to respond to the Board's 18 November 2014 order within 21 days. Vertex failed to respond to the order.

5. By date of 30 January 2015, citing Vertex's lack of response to the 18 November 2014 and 29 December 2014 orders, the government moved that the Board dismiss with prejudice, or, in the alternative, to order Vertex to show cause why the appeals should not be dismissed.

6. By order to show cause dated 3 February 2015, the Board directed Vertex either to respond to its 18 November 2014 order, or to show cause why these four appeals should not be dismissed for lack of prosecution. The Board warned that, in the event of noncompliance, "the Board may dismiss the appeals with prejudice under Board Rule 17, without further notice to the parties."

7. By date of 27 February 2015, the government moved to dismiss all four of these appeals for failure to prosecute. By order dated 4 March 2015, the Board directed appellant to respond to the government's motion within 30 days.

8. By order to show cause dated 13 April 2015, the Board gave Vertex another 14 days either to respond to the Board's 4 March 2015 order, or to show cause why these four appeals should not be dismissed for lack of prosecution.

9. To date, the Board has received no response from Vertex to its orders of 18 November 2014, 29 December 2014, 3 February 2015, 4 March 2015, or 13 April 2015.

*Contract 7048: ASBCA No. 59646*

10. By date of 23 February 2013, the government awarded Contract No. W56SGK-13-C-7048 (contract 7048) to Vertex to disassemble and reassemble 44 re-locatable buildings in Afghanistan (compl. at 10-11). Thereafter, by letter dated 13 August 2013, the contracting officer terminated contract 7048 for default (compl. at 27).

11. By date of 31 August 2013, Vertex submitted a request for equitable adjustment to the contracting officer (compl. at 64). The contracting officer failed to render a decision on the request, and by date of 27 October 2014, Vertex brought an appeal under contract 7048 that we docketed as ASBCA No. 59646 (corrected notice of docketing at 1).

12. On 7 November 2014, the Board issued its decision in *Vertex*.

13. By date of 17 November 2014, the government moved for summary judgment in this appeal, relying upon the Board's decision in *Vertex*.

14. The Board thereafter issued in this appeal the same orders dated 18 November 2014 (*see* statement 3), 29 December 2014 (*see* statement 4), 3 February 2015 (*see* statement 6), 4 March 2015 (*see* statement 7), and 13 April 2015 (*see* statement 8) that it issued in ASBCA Nos. 58989 and 59635. *Vertex* did not respond to any of those orders in this appeal.

*Contract 7050: ASBCA No. 58990*

15. By date of 2 March 2013, the government awarded Contract No. W56SGK-13-C-7050 (contract 7050) to *Vertex* for the disassembly and reassembly of container units in Afghanistan (notice of appeal at 1). Thereafter, by date of 14 August 2013, the contracting officer terminated contract 7050 for default (*id.*). By date of 1 November 2013, *Vertex* brought the appeal that we docketed as ASBCA No. 58990.

16. As in ASBCA Nos. 58989 and 59635, by order dated 18 November 2014, the Board directed the parties to provide their views on the impact, if any, of the Board's decision in *Vertex* (*see* statement 3). In response, the government also moved that this appeal be dismissed for failure to state a claim upon which relief can be granted.

17. The Board thereafter issued in this appeal the same orders dated 18 November 2014 (*see* statement 3), 29 December 2014 (*see* statement 4), 3 February 2015 (*see* statement 6), and 4 March 2015 (*see* statement 7), and 13 April 2015 (*see* statement 8) that it issued in ASBCA Nos. 58989, 59635, and 59646. *Vertex* did not respond to any of the orders in this appeal.

### DECISION

Our authority to take appropriate action for a party's failure to proceed with an appeal is derived from Rule 17 of the Board's 2014 Rules, which was formerly Board Rule 31. It provides, in part, that:

Whenever the 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 with

prejudice for failure to prosecute.... If good cause is not shown, the Board may take appropriate action.

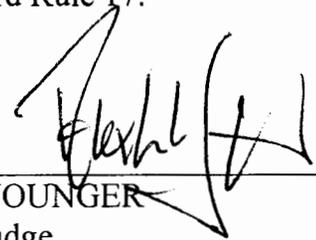
Board Rule 16 (formerly Board Rule 35) provides for discretionary sanctions where a party “fails to obey an order issued by the Board.” We have interpreted the reference to “appropriate action” in former Board Rule 31 to include a dismissal with prejudice as one of the permissible sanctions. *E.g., Government Therapy Services, Inc.*, ASBCA No. 53972, 04-2 BCA ¶ 32,774 at 162,063. The same meaning is applicable to the closely parallel language in Board Rule 16. *See Shubhada Industries*, ASBCA No. 58173, 15-1 BCA ¶ 35,863 at 175,340.

Vertex plainly falls within Board Rule 17 because it has egregiously failed to “comply with orders of the Board” in all four of these appeals. Vertex failed to comply with the Board’s 18 November 2014, 29 December 2014, and 4 March 2015 orders in all four appeals (statements 4, 9, 14, 17). In addition, while a show cause order “is intended to give [a party] the opportunity to explain the circumstances surrounding its failure to move [an] appeal forward before it is dismissed,” *Government Therapy Services*, 04-2 BCA ¶ 32,774 at 162,063, Vertex twice failed to avail itself of the opportunity. It did not respond to either the 3 February 2015, or to the 13 April 2015 show cause orders (statements 6, 8, 14, 17). Vertex has shown an intention not to continue with the prosecution of these appeals, and dismissal with prejudice is warranted.

CONCLUSION

Accordingly, the government’s motion to dismiss for failure to prosecute is granted and these appeals are dismissed with prejudice under Board Rule 17.

Dated: 27 August 2015



ALEXANDER YOUNGER  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



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

I concur



RICHARD SHACKLEFORD  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Order of Dismissal of the Armed Services Board of Contract Appeals in ASBCA Nos. 58989, 58990, 59635, 59646, Appeals of Vertex Construction & Engineering, rendered in conformance with the Board's Charter.

Dated:

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JEFFREY D. GARDIN  
Recorder, Armed Services  
Board of Contract Appeals