

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
R.J. Lanthier Co., Inc. ) ASBCA No. 51636  
)  
Under Contract No. N63387-90-C-6538 )

APPEARANCE FOR THE APPELLANT: Robert Sabahat, Esq.  
The Madison Harbor Group  
Anaheim, CA

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.  
Navy Chief Trial Attorney  
Stephen R. O'Neil, Esq.  
Assistant Director  
Navy Litigation Office  
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE ELMORE  
ON THE GOVERNMENT' S MOTION TO DISMISS

The Government on 3 April 2001 filed a motion to renew its 13 November 2000 Motion to Dismiss with Prejudice. The appellant's attorney, Robert Sabahat, Esq., has filed a response in opposition to the Government's motion and the Government has filed a rebuttal to appellant's response.

13 November 2000 Motion

On 13 November 2000 the Government filed a motion to dismiss averring that appellant failed to abide by the Board's order to provide supplemental answers to discovery and failed to arrange for review of the Government's files in discovery. During a 29 November 2000 telephonic conference the Board deferred ruling on the Government's motion to allow the appellant's then attorneys, Andrew Pearson, Esq. and Jason R. Thornton, Esq., to correct the noted discrepancies. Subsequent submittals made by appellant's attorneys in December 2000 rendered the 13 November 2000 motion moot.

3 April 2001 Motion

The Government on 3 April 2001 filed a motion renewing the 13 November 2000 motion to dismiss. Since we have determined the 13 November 2000 motion to be moot, we deem the Government's 3 April 2001 motion a new motion and render our decision on the arguments contained therein.

The Government in its 3 April 2001 motion argues that the appellant has neither supplemented its answers to the Government's interrogatories in a meaningful way nor made arrangements to copy documents made available for review and inspection. The Government further contends the appellant's new counsel's actions to date, the original counsel having withdrawn, has left Government counsel with a pessimistic outlook for accomplishing future discovery in a timely and satisfactory manner.

Mr. Sabahat, responding to the Government's 3 April 2001 motion, argues he was not retained until the beginning of March 2001, that he received the files from appellant's former counsel within a week of being retained and began immediately reviewing them in order to prepare "further supplemental responses per Government's request and also to prepare to engage in ADR at the earliest possible time," that the Government's motion was filed a month after he had been substituted, and that Government counsel is being unreasonable in expecting him to "have reviewed three years of case files, as well as several voluminous reports, and have prepared supplemental responses to over 80 discovery requests in a three week period" (app. resp. at 3-4). Mr. Sabahat further argues the December, 2000 supplemental responses were supplemented with a two volume history report which answered many of the interrogatories which were difficult to answer any other way. Mr. Sabahat attached to his response in opposition to the Government's motion the following: Submittal History Documentation dated 1 December 2000, Volumes 1 and 2; Neail Electric's equitable adjustment request and Hill International's Cost Overrun Analysis dated 30 November 1999; and appellant's 23 April 2001 Second Supplemental Response to Respondent's First Discovery Request.

The Government in its rebuttal argues the appellant has not been forthright in its response in opposition inasmuch as Mr. Sabahat was providing supplemental responses as well as the 30 November 1999 report of Hill International both of which should have been provided in December 2000.

#### DECISION

It is uncontroverted that Mr. Sabahat was retained in March 2001 to represent appellant after Messrs. Thornton and Pearson withdrew. The Government's motion complains primarily of lapses which occurred prior to Mr. Sabahat filing his notice of appearance. Although a change of attorneys is not usually a compelling excuse for delay the Board is not inclined to hold a new attorney accountable for the transgressions of prior counsel. Suffice it to say that in this instance Mr. Sabahat was the recipient of a large amount of documentation which he needed to cull through before he could supplement appellant's supplemental responses served in December 2000 or respond to the many discovery requests that have heretofore been filed. It has been consistently held that "dismissal for failure to prosecute is a 'harsh sanction which should usually be employed only in extreme situations, when there is a *clear record of delay* or contumacious conduct,

or when other less drastic sanctions have proven unavailable” (citations omitted). *Grun v. Pnemo Abex Corp.*, 163 F.3d 411 (7th Cir. 1998). Normally discovery issues should be dealt with informally or by motion to compel.

Based on the record before us we do not find Mr. Sabahat’s actions during the one month prior to the Government’s filing its 3 April 2001 motion to dismiss to justify dismissal. Rather, Mr. Sabahat appears to have worked diligently to move the appeal forward. Counsel should work together to resolve any remaining issues.

The Government’s motion is denied.

Dated: 10 May 2001

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ALLAN F. ELMORE  
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. 51636, Appeal of R.J. Lanthier Co., Inc., rendered in conformance with the Board's Charter.

Dated:

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EDWARD S. ADAMKEWICZ

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Recorder, Armed Services  
Board of Contract Appeals