

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Generator Technologies, Inc.) ASBCA No. 53206
)
Under Contract No. DADW35-99-P-0920)

APPEARANCE FOR THE APPELLANT: Mr. Dan Zemel
President

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ Leslie A. Nepper, JA
Trial Attorney

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

Respondent has moved to dismiss this appeal for failure to prosecute. Appellant has not responded either to the motion or to an order to show cause, and has failed to comply with other deadlines. We grant the motion and dismiss the appeal.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. By date of 29 September 1999, respondent awarded appellant Contract No. DADW35-99-P-0920 to furnish and install an emergency diesel generator at the Ammunition Supply Point at Fort A.P. Hill, VA. (R4, tab 1 at 1-2, 7) The delivery date specified in the contract was 30 November 1999 (*id.* at 2).
2. The contract contained various standard clauses, including FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (MAY 1999) (*id.*, tab 1 at 3).
3. Contract performance gave rise to a dispute regarding appellant's compliance with the delivery schedule (*id.*, tabs 7-9). The contracting officer ultimately terminated the contract for default and reduced the contract price (*id.*, tab 10).
4. Appellant thereafter, on 18 December 2000, brought this appeal, challenging the default termination and reduction of the contract price. By order dated 4 January 2002, we set a 23 July 2002 trial date and established 28 June 2002 as the discovery completion date.
5. In November 2001, respondent served interrogatories, requests for production of documents and requests for admissions on appellant. Appellant's then-counsel forwarded

the discovery requests to appellant's president, who failed to answer them over a period of almost five months, despite entreaties to do so by counsel. By order dated 2 April 2002, we gave appellant ten days to answer the discovery requests and directed appellant's then-counsel to explain again to his client that failure to respond could result in sanctions. Appellant failed to respond to the discovery requests.

6. By date of 18 April 2002, respondent moved for sanctions seeking either that the appeal be dismissed or that appellant be barred from presenting evidence covered by the requests. By letter to the Recorder dated 22 April 2002, appellant's then-counsel withdrew, noting that he had communicated with his client in February and April, explaining appellant's obligation to comply with discovery requests and Board orders. Appellant failed to respond to the motion for sanctions.

7. With no communication from appellant, respondent filed the present motion to dismiss for failure to prosecute. By order dated 9 July 2002, we gave appellant until 26 July 2002 within which to respond to that motion. Appellant failed to do so.

8. Subsequently, by date of 30 August 2002, we ordered appellant's president to show cause "by or before 20 September 2002 why this appeal should not be dismissed for failure to prosecute under Board Rule 31." The order was sent by certified mail, and the return receipt reflects that appellant's president signed for the order on 30 September 2002. To date, appellant has failed to respond to the order to show cause.

DECISION

Our Rule 31, DISMISSAL OR DEFAULT FOR FAILURE TO PROSECUTE OR DEFEND, provides for issuance of an order to show cause why the appeal should not be dismissed where the record discloses a failure "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 with the prosecution . . . of an appeal." Our Rule 35, SANCTIONS, provides for discretionary sanctions where a party "fails or refuses to obey an order issued by the Board."

Where there has been a failure to respond to an order to show cause, we have dismissed appeals, recognizing nonetheless 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." *David's Econo-Move, Inc.*, ASBCA Nos. 49105, 49562, 00-1 BCA ¶ 30,621 at 151,156. On the present record, appellant's disregard of the order to show cause (finding 8), together with its failure to respond either to discovery requests that have been outstanding for nearly eleven months (finding 5), or to two pending motions (findings 6-7), establish beyond cavil "a pattern of conduct and lack of action constituting a failure to prosecute the appeal." *Tech-Tron Constructors*, ASBCA No. 46367, 97-1 BCA ¶ 28,746

at 143,748 (appeal dismissed for failure to prosecute due to protracted discovery delays and failure to respond to Board orders).

CONCLUSION

The appeal is dismissed with prejudice pursuant to Rule 31.

Dated: 22 October 2002

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

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. 53206, Appeal of Generator Technologies, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals