

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Texas Engineering Solutions) ASBCA Nos. 53669, 54087, 54233
)
Under Contract No. F29601-95-C-0173)

APPEARANCE FOR THE APPELLANT: Mr. Alfred E. Pevler
President

APPEARANCES FOR THE GOVERNMENT: Thomas B. Pender, Esq.
Chief Trial Attorney
Lawrence S. Rabyne, Esq.
Trial Attorney
Defense Contract Management Agency,
Arlington Heights

OPINION BY ADMINISTRATIVE JUDGE REED
ON APPELLANT’S MOTION FOR SUSPENSION
OR FOR DISMISSAL WITHOUT PREJUDICE
UNDER BOARD RULE 30

By a motion for suspension under Board Rule 30 dated 2 August 2003, appellant (Texas Engineering Solutions, TES or the contractor) asks that the Board suspend “the appeals without prejudice as provided for under ASBCA Rule 30” (app. mot. at 1). No particular time limitation for the suspension of the appeal proceedings is suggested. The government, in its opposition to the motion dated 18 September 2003, construes the motion first as one “to suspend ‘the appeals without prejudice’ for an undisclosed amount of time under the Board’s Rule 30” (gov’t opp’n at 1). Later in the document, the government argues against dismissal of the appeals without prejudice. The contractor submitted a response dated 26 September 2003, and a supplemental response to the government’s opposition dated 13 February 2004.

The Board has previously decided a government motion for partial dismissal related to two of the three captioned appeals. *Texas Engineering Solutions*, ASBCA Nos. 53669, 54087, 03-2 BCA ¶ 32,272. Familiarity with the facts set forth in that opinion is presumed. The appeals relate to termination of the contract for the convenience of the government (TFC) in 1997, appellant’s TFC settlement proposals and other claims that have been disputed by the government, and the government’s claim for return of all money disbursed under the captioned contract plus interest (R4, tabs G-7, -24, -45, -46, -47, -49, -62, -99, -135, -183, -191).

The government has asserted but has provided no evidence to show that the contracting officer (CO) for the TFC and the supervisor of the original termination CO (TCO), characterized by the government as “an active member of the termination team,” have retired from government service. On or about 22 January 2003, the original TCO died. (R4, tabs G-30, -186, -193; gov’t opp’n, ¶ 8)

In a telephone conference on 11 February 2004, among the Board, Mr. Pevler, the contractor’s president, apparent sole proprietor, and appellant’s *pro se* representative (appellant *pro se*), and government counsel, the government summarized the basis for the government’s claim as follows. The government has disbursed money under the contract. After termination, the government requested that the contractor supply to the government any end product produced, any work in progress, including parts and other materials, and all government-furnished equipment and materials. To date, TES has declined. Evidence is being compiled by the government to show the value of the items requested by the government from the contractor following the TFC. Therefore, the government submits that it is entitled to a return of funds that equal the value of items improperly withheld by TES. The amount to be proved is susceptible of proof as more information and evidence becomes available through discovery and otherwise. (Bd. telephone conference mem. and order dtd. 13 Feb. 2004, ¶ V.B.; R4, tab G-46; app. mot., ¶ 1)

In that same telephone conference, appellant *pro se* stated that he requests either dismissal without prejudice or a long-term suspension. He has submitted medical information to the Board to the effect that he should not at this time attempt to represent appellant. One medical evaluation implies that the difficulties being experienced by appellant *pro se* would be buffered by the assistance of counsel for TES. Appellant *pro se* has for some time been attempting to obtain counsel. During the eight-month period from about June 2003 to about January 2004, appellant *pro se* asserts that appellant accumulated about one half of the required attorney’s fee. (Bd. telephone conference memoranda and orders dtd. 13 Feb. 2004, ¶ I.A., 28 July 2003, ¶ I., 6 Feb. 2003, ¶ I.; app. supp. R4, tabs A-40, -44, -45, -46)

Board Rule 30, in relevant part, provides as follows:

The Board may suspend the proceedings . . . for good cause shown. In certain cases, appeals . . . are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without

prejudice to their restoration when the cause of suspension has been removed.

Dismissal without prejudice pursuant to Board Rule 30 is discretionary with the Board. Suspension of appeal proceedings under Board Rule 30 is also discretionary. In deciding whether to dismiss without prejudice or to suspend the proceedings, the Board's discretion is informed by all relevant circumstances. Those circumstances, as they support one or the other party, are then considered, weighed and balanced, taking into account the interests of justice. *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1201-02 (Fed. Cir. 1987); *American Renovation & Construction Co.*, ASBCA No. 53946, 03-2 BCA ¶ 32,369 at 160,167; *Raytheon Co.*, ASBCA No. 52226, 03-2 BCA ¶ 32,362 at 160,120; *R&R Group, Inc.*, ASBCA Nos. 52328, 52711, 02-1 BCA ¶ 31,728 at 156,754-55.

The contractor's prosecution of the appeals has been and is being adversely affected by the medical difficulties being experienced by appellant *pro se*. Based on the information available to us, this situation may continue until counsel is retained by the contractor.

We recognize that legal counsel in appeals before the Board is desirable but not necessary for prosecuting an appeal. *Airborne Industries, Inc.*, ASBCA Nos. 45491 *et al.*, 95-1 BCA ¶ 27,496 at 137,032, *aff'd on recons.*, 95-1 BCA ¶ 27,411. However, the situation here transcends mere lack of assistance by counsel. Appellant *pro se* has medical reasons for not proceeding without the interposition of counsel.

The government argues that it will be prejudiced by continued delay in the appeal proceedings. Circumstances highlighted by the government are the affirmative claim against the contractor, the death of the initial TCO, and retirements from government service of two persons familiar with the claims and appeals.

Concerning the alleged retirements, we would expect the government to take steps to preserve information that could be provided by persons familiar with the claims and appeals if it is known that those persons might become unavailable. The extra work for the government caused by such efforts is well within the limits of normal expectations in litigation. Absent evidence to the contrary, we are not convinced that the government has yet been prejudiced. The challenges presented are not insurmountable.

More compelling is the government's need to move forward with the appeals on account of its affirmative claim which is intertwined with the contractor's claims. A prolonged suspension of the proceedings would take no account of the government's claim and related circumstances.

Having considered the totality of the circumstances, we decline to suspend the appeals for an indefinite time period. The government's need for finality on its claim and the interconnectedness of the claims and appeals are the primary bases for our decision. TES has the power to decide whether it wishes to prosecute its claims and appeals. However, the contractor has no such prerogative over the government's affirmative claim. *Smith & Smith Aircraft Co.*, ASBCA Nos. 37793 *et al.*, 92-2 BCA ¶ 24,871 at 124,078. Each party has a right to a hearing and decision. *Ingalls Shipbuilding Division, Litton Systems, Inc.*, ASBCA No. 22645, 78-2 BCA ¶ 13,350 at 65,260-61. The hearing and decision should be accomplished as soon as practicable considering all prevailing circumstances. 41 U.S.C. § 607(e).

Instead, because the appeals effectively have been and continue to be suspended on account of circumstances over which the Board has no control, the more balanced approach is to dismiss the appeals without prejudice for a period that should allow TES to marshal the resources necessary to obtain counsel. The limited time set out below during which the contractor may seek to reinstate the appeals to the Board's active docket provides the government a measure of protection from undue prejudice.

The Board has previously explained to appellant *pro se* the progression of future consequences if dismissal without prejudice is granted. Dismissal without prejudice "automatically" becomes a dismissal with prejudice if TES (or the government) does not submit to the Board a written request to reinstate the appeals on or before the directed deadline. Dismissal with prejudice is a judgment on the merits. *Phoenix Petroleum Co.*, ASBCA No. 45414, 02-1 BCA ¶ 31,835 at 157,283, 157,285; *Bulloch International, Inc.*, ASBCA No. 44210, 93-2 BCA ¶ 25,692 at 127,808.

The appeals are hereby dismissed under Board Rule 30 without prejudice subject to reinstatement within one year from the date of this decision. If neither party asks the Board, in writing, to reinstate the appeals within the stated time period, the appeals will be deemed dismissed with prejudice.

Dated: 23 February 2004

STEVEN L. REED
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 Nos. 53669, 54087, and 54233, Appeals of Texas Engineering Solutions, rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUBE
Acting Recorder, Armed Services
Board of Contract Appeals