

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Environmental Safety Consultants, Inc.) ASBCA No. 54615
)
Under Contract No. N62470-95-C-2399)

APPEARANCE FOR THE APPELLANT: Mr. Peter C. Nwogu
President/CEO

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Ellen M. Evans, Esq.
Senior Trial Attorney
Naval Facilities Engineering
Command
Litigation Headquarters
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE VAN BROEKHOVEN
ON APPELLANT'S MOTION FOR RECONSIDERATION

Appellant, on 29 March 2007, filed a motion for reconsideration to our decision dismissing with prejudice appellant's appeal, *Environmental Safety Consultants, Inc.*, ASBCA No. 54615, 07-1 BCA ¶ 33,483, dated 31 January 2007. Familiarity with that decision is presumed. The government opposed appellant's motion on the grounds that it was untimely.

According to the Board records, our decision dismissing the appeal with prejudice was mailed to appellant, certified mail, return receipt requested, on 31 January 2007. Although we have no explanation for the delay in its receipt by appellant, according to the Board records, as evidenced by the certified mail receipt in the Board's file, and appellant's admission in its motion for reconsideration, appellant received the decision on 17 February 2007. Thus, the deadline for filing a motion for reconsideration was 19 March 2007.

By letter dated 8 March 2007, appellant requested additional time within which to file its motion for reconsideration, stating that:

On February 17, 2007, appellant received 45 pages of the Board's decision on the appeal of appellant on the matter

of asking the Board to require the United States Navy to release wrongful [sic] withheld earned contract funds due to appellant in 1996 through 1998.

Appellant is in the process of asking the Board to take another look at the facts and reconsider its decision. Appellant is asking the Board for additional time through April 17, 2007 to file its motion for reconsideration. This request is caused by Mr. Nwogu's flue [sic] over several weeks and has not gotten better yet.

Appellant has mailed a copy of this letter to Ellen M. Evans, Naval Facilities Engineering Command Litigation Office, Engineering Field Activity Chesapeake, 720 Kennon Street, SE, Bldg, 36, Room 136, Washington, DC 20374.

Thank you for your understanding in this matter.

Neither the Board or the government responded to appellant's letter.

Appellant subsequently, on 29 March 2007, filed a motion for reconsideration in which it essentially repeated the factual and legal arguments contained in its extensive initial response to the government's motion to dismiss the appeal for lack of jurisdiction, with the added assertion of Board bias against appellant. We note that the government, in its initial motion to dismiss the appeal, included specific proposed findings of fact, and extensive attachments in support of its motion. Similarly, appellant responded to the motion with four volumes of argument and attachments. We considered all of these in issuing our decision, *Environmental Safety Consultants, Inc.*, ASBCA No. 54615, 07-1 BCA ¶ 33,483, *supra*.

In its opposition to appellant's motion for reconsideration on the basis of its asserted lack of timeliness, the government does not respond to each of appellant's assertions of factual and legal errors in the Board's decision, or alleged Board bias against appellant. Rather, the government merely asserts that the Board should dismiss appellant's motion for reconsideration as untimely, without reaching the merits of the motion. By letter, dated 17 April 2007, appellant responded to the government's assertion that appellant's motion for reconsideration is untimely. According to appellant's response, appellant was unable to complete its motion for reconsideration because appellant's president was ill and under the influence of various medications and medical laboratory testing to control his prolonged illness associated with coughing, chest pain, and fever. Appellant then described his visits to medical specialists, and the

fact that he was taking medications, and offered to provide medical information from his physicians evidencing his illness. Nevertheless, appellant asserted that its 8 March 2007 letter to the Board met the Board's rules requiring motions for reconsideration to be filed within 30 days after receipt of the Board's decision, and that its 8 March 2007 letter stated not only that appellant disagreed with the Board's decision, "but it pointed out the issues appellant disagreed with" (at 2).

The only issue currently before the Board is the timeliness of appellant's motion for reconsideration. According to appellant's response to the government's submission, appellant's 8 March 2007 letter to the Board pointed out that appellant's progress payments "claim" of June 1997 invoices accrued in 1998 when all the events occurred, and not in 1997, as the Board erroneously found, and as such, was "a part and parcel of appellant's response for reconsideration." Appellant further alleged that in its 8 March 2007 letter, appellant pleaded that most of the Board's assertions were based on false assumptions of what the Board may have believed happened during the course of the progress payment claim, and that appellant's position in its 8 March letter "was that the progress payment 'claim' accrued in 1998, when all events have occurred (Appellant's Exhibits in Tab #8) and negotiations reached [an] impasse, which fixed the liability of the Government." Moreover, appellant alleged that its 8 March 2007 letter "argued that appellant's progress payment claim accrued in 1998 contrary to the Board's decision that the claim accrued before October 1997." Appellant then contends that it raised this issue in its 8 March 2007 letter to the Board to reconsider, and that this "letter alone was very specific on what issue appellant disagreed with and why." Appellant combined its 8 March 2007 letter and its 29 March 2007 letter by stating that there "is no doubt that appellant's March 8, 2007, was a motion for reconsideration since it disagreed with the Board's wrongful decision" and that "[t]his disagreement was expanded in the March 29, 2007 response." (App. resp. at 2-3) We have quoted the entire content of appellant's 8 March 2007 letter above, and it is quite obvious that appellant reads far more into that letter than do we.

Rule 29 of the Board Rules provides:

A motion for reconsideration may be filed by either party. It shall set forth specifically the grounds relied upon to sustain the motion. The motion shall be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion.

We have consistently strictly enforced the time limit set forth in Rule 29 of the Board Rules. *Campbell Plastics Engineering & Mfg., Inc.*, ASBCA No. 53319, 03-2 BCA ¶ 32,407; *Ship Analytics International, Inc.*, ASBCA No. 50914, 01-1 BCA ¶ 31,394; *Corbett Technology Company, Inc.*, ASBCA No. 49477, 00-2 BCA ¶ 30,922;

Swanson Products, Inc., ASBCA No. 48002, 96-2 BCA ¶ 28,486; *Keith Crawford & Associates*, ASBCA No. 46893, 95-2 BCA ¶ 27,715; *South Pittsburgh Cable Co., Inc.*, ASBCA No. 47225, 95-1 BCA ¶ 27,590; *Arctic Corner, Inc.*, ASBCA No. 33347, 92-2 BCA ¶ 24,874.

Indeed, appellant is well-aware of our strict enforcement of Rule 29. *Environmental Safety Consultants, Inc.*, ASBCA No. 51722, 03-2 BCA ¶ 32,260. In this companion appeal to the instant appeal, appellant's motion for request of reissuance of the Board's decision dated 18 October 2002, sought, not reversal of our decision, but a change in the date of our decision, "so that we can have the opportunity to file an appeal [to the United States Court of Appeals for the Federal Circuit]," although appellant complained in this motion that our decision was in error (03-2 BCA at 159,575). We had previously dismissed the monetary claim that is the subject of the instant appeal, *Environmental Safety Consultants, Inc.*, ASBCA No. 51722, 02-2 BCA ¶ 31,951, and on reconsideration, affirmed that decision, *Environmental Safety Consultants, Inc.*, ASBCA No. 51722, 03-1 BCA ¶ 32,057. The Board had mailed its decision on reconsideration to appellant by certified mail, return receipt requested. However, appellant's copy of the Board decision was returned by the U.S. Post office as "unclaimed." In denying appellant's motion to have the date of our decision changed so that it could appeal that decision, quoting from *Mac-In-Erny, Inc.*, ASBCA No. 28689, 88-1 BCA ¶ 20,359 at 102,951, *aff'd, Mac-In-Erny, Inc. v. United States*, 862 F.2d 321 (Fed. Cir. 1988) (table), we said, "[a]ppellant's failure to receive the certified mailings of the Board's order dismissing the appeal . . . should not now be used by appellant as a basis for extending the period in which it can file a timely motion for reconsideration." Appellant subsequently appealed our decision to the United States Court of Appeals for the Federal Circuit. In an unpublished order, the Court of Appeals dismissed the appeal in accordance with Federal Circuit Rule 52(a)(1) for appellant's failure to pay the docketing fee within the time permitted by the rules, and failure to prosecute the appeal, and in a further order, upon appellant's payment of the docketing fee, dismissed the appeal for appellant's failure to comply with the Court's order and for failure to prosecute its appeal.

In *Mac-In-Erny, Inc.*, ASBCA No. 28689, 88-1 BCA ¶ 20,359 at 102,951, *aff'd, Mac-In-Erny, Inc. v. United States*, 862 F.2d 321 (Fed. Cir. 1988) (table), the Board had dismissed the appeal for failure to prosecute under Board Rule 31 on 16 June 1986. *Mac-In-Erny, Inc.* subsequently, on 17 March 1987, approximately nine months after our order dismissing the appeal, moved for reconsideration and reinstatement of the appeal. We held that the appellant's motions for reconsideration and reinstatement were untimely. We then considered whether the motions were in actuality motions for relief from final judgment, as permitted by Rule 60 of the Federal Rules of Civil Procedure. Citing *United States v. Atkinson*, 748 F.2d 659, 660 (Fed. Cir. 1984), and *Washington Medical Center, Inc. v. United States*, 211 Ct. Cl. 379 (1977), we held that this was not

an extraordinary case sufficiently justifying our exercise of discretionary relief vacating the order of dismissal.

Moreover, that appellant is familiar with our strict enforcement of Board Rule 29 is reflected in appellant's response to the government's opposition to appellant's motion for reconsideration. In attempting to persuade us of the timeliness of its motion for reconsideration, appellant links its 29 March 2007 substantive motion for reconsideration, which was clearly outside the 30-day limit prescribed by Rule 29, to appellant's earlier letter of 8 March 2007 to the Board.

However, the law is clear in this regard as well. Rule 29 expressly provides that the motion for reconsideration "shall set forth specifically the grounds relied upon to sustain the motion." We have long held that absent specificity in the alleged grounds upon which the motion is based, a purported motion for reconsideration does not satisfy the requirements of Rule 29. *Ralph M. Parsons Company*, ASBCA Nos. 37931 *et al.*, 91-2 BCA ¶ 23,751 at 118,934 (untimely motion for reconsideration, preceded by a letter advising the Board that government intended to file a motion for reconsideration does not "set forth specifically the grounds for" for reconsideration as required by Rule 29); *Southwest Marine, Inc.*, ASBCA No. 33208, 89-1 BCA ¶ 21,197 at 106,972 (two sentence motion which stated that the grounds for the motion are that the opinion is erroneous in its findings of fact and application of law was insufficient to comply with Rule 29); *Metro Builders, Inc.*, ASBCA No. 30626, 86-3 BCA ¶ 19,105 at 96,572 ("Merely stating that the party requesting the motion does not agree with the decision is an inadequate ground for reconsideration."); *Vi-Mil, Inc.*, ASBCA Nos. 16820, 18005, 75-2 BCA ¶ 11,618 at 55,475 (although the appellant filed a timely motion for reconsideration, "[t]he motion contains three general assertions of error, but is otherwise barren of support for such assertions," and as such does not comply with Rule 29); *U. S. Optics Corporation*, ASBCA No. 21941, 1979 WL 2359, unpublished, on *mot. for recons.*, from 79-1 BCA ¶ 13,595 ("Appellant asserts in motion for reconsideration that our decision was contrary to the facts in the case and contrary to the law, but does not specifically set forth the grounds on which it relies, as required by the Board's Rule 29"); *Erin Metals Corporation of Arizona*, ASBCA Nos. 5194, 5624, 1960 WL 395, unpublished, on *mot. for recons.* from 59-1 BCA ¶ 2407 ("the motion fails to set forth specifically the ground or grounds relied upon as required by our Rule 29").

In the instant appeal, in its letter of 8 March 2007 to the Board, which was mailed to the Board within 30 days following appellant's receipt of our decision, appellant merely stated that it was in the process of asking the Board to take another look at the facts and reconsider its decision. Moreover, the mere expression of the process which appellant was following to seek reconsideration of the Board's decision, barren of any statement of specific disagreement with the Board's decision, and barren of any support for such disagreement, does not comply with the requirements of Rule 29.

Further, although we hold that appellant's letter of 8 March 2007 to the Board does not satisfy the requirements of Rule 29, we address the question of whether or not appellant's request therein for additional time within which to file a motion for reconsideration allows us to waive the time limits of Rule 29. We hold that it does not. In *Management Advisory Services, Inc.*, ASBCA 22759, 79-2 BCA ¶ 13,915 at 68,305, the appellant stated that "I will appreciate the Board granting me the courtesy of an additional review by stretching the time limit for the filing of a motion for reconsideration." We held that "Rule [29] is clear as to the time for such filing, and no legal basis for extending it has been shown."

Accordingly, we dismiss appellant's motion as untimely.

Dated: 18 June 2007

ROLLIN A. VAN BROEKHOVEN
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. 54615, Appeal of Environmental Safety Consultants, Inc, rendered in conformance with the Board's Charter.

Dated:

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