

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Tokyo Company) ASBCA No. 59906
)
Under Contract No. W90U3Z-08-M-8031)

APPEARANCE FOR THE APPELLANT: Mr. Beniamen Monadhil
Owner/General Manager

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Jessica E. Edgell, JA
Trial Attorney

ORDER OF DISMISSAL FOR FAILURE TO PROSECUTE

On 31 March 2016, the Board issued an order to appellant to show cause why this appeal should not be dismissed for failure to prosecute. We issued this order because over a period of approximately five months, appellant had been non-responsive to government discovery requests; had failed to respond to the government’s motion to compel; and had failed to act upon our order requiring compliance with its discovery obligations. Further, because appellant was completely incommunicado, we were compelled to cancel a status conference and the hearing on the merits to which appellant had previously agreed.

On 15 April 2016, appellant responded to the show cause order by stating that it had been unable to access its yahoo.com email account by which it communicated with the government and the Board. The Board issued an order on 18 April 2016, requiring appellant to explain how it was that it was unable to access its email account for a five-month period and what efforts it had undertaken to remedy the situation. Appellant responded by stating that it had been forced to depart its offices in Baghdad due to the security situation, but did not satisfactorily explain why it had been unable to access its email account for that entire amount of time or what efforts it undertook to resume communications with the Board. Nevertheless, the Board issued a follow-up order on 28 April 2016 explaining that appellant’s response had been inadequate, explaining the deficiencies in appellant’s earlier responses, and explicitly providing appellant “one last chance” to properly respond to our order. The 28 April order required a response from appellant by 4 May 2016. To date, appellant has filed no response with the Board.

Although dismissal for failure to prosecute is a “harsh measure” to be employed only “sparingly,” *see Sykes Commc’ns, Inc.*, ASBCA Nos. 53842, 54077, 05-1 BCA ¶ 32,864 at 162,853, we are not required to continue this appeal merely because there was *some* response to the initial show cause order. “The fact that appellant makes *some*

response, is not necessarily a showing of good cause.” *Scorpio Piping Co.*, ASBCA No. 34073, 89-2 BCA ¶ 21,813 at 109,764. To preclude such a dismissal, appellant is required to show, “compliance with the Board’s instructions and a meaningful effort to continue with the prosecution of the appeal.” *Id.* (citing *McDaniel Enterprises*, PSBCA No. 1401, 86-3 BCA ¶ 19,285). This, appellant has failed to do, notwithstanding our forbearance and clear statement that it was given “one last chance” to explain itself.

Accordingly, ASBCA No. 59906 is hereby dismissed with prejudice for failure to prosecute under Board Rule 17.

Dated: 24 May 2016



J. REID PROUTY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



MARK N. STEMLER
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 No. 59906, Appeal of Tokyo Company, rendered in conformance with the Board's Charter.

Dated:

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