ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Phoenix Petroleum Company	)	ASBCA No. 45414
	)	
Under Contract No. DLA600-90-D-0542	)	

APPEARANCE FOR THE APPELLANT: Doron A. Henkin, Esq.
Marvin, Larsson, Henkin & Scheuritzel
Philadelphia, PA

APPEARANCE FOR THE GOVERNMENT: Howard M. Kaufer, Esq.
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Defense Logistics Agency
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OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON APPELLANT' S MOTION TO REINSTATE

Appellant moves to reinstate an appeal from a contracting officer's decision demanding payment of $682,280.31 in excess reprocurement costs following the default termination of a contract to deliver jet fuel. Although the appeal was dismissed without prejudice pursuant to Rule 30 on 30 March 1993, neither party moved to reinstate within the time prescribed in the Board's order of dismissal. As a result, the dismissal without prejudice was converted to one with prejudice on 10 July 1996.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 4 September 1990, the Defense Fuel Supply Center (DFSC) awarded the subject indefinite quantity contract to appellant to supply JP-4 jet fuel to various military bases. The contract included clause B19.33 ECONOMIC PRICE ADJUSTMENT—PUBLISHED MARKET PRICE (DFSC DEC 1989) (EPA clause). (ASBCA No. 45414, R4, tab 3)

2. The contract was subject to the Contract Disputes Act of 1978 (Act), 41 U.S.C. §§ 601-613 (ASBCA No. 42763, R4, tab 1 at 92). The Act contains the following provisions that are relevant, in part, to this motion:

§ 605. Decisions by contracting officer

. . . .

(b) Review . . .

The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced . . . .

3. DFSC terminated the contract for default on 15 January 1991 (ASBCA No. 42763, SR4, tab 61). Appellant timely appealed the termination for default to this Board on 12 April 1991, where it was docketed as ASBCA No. 42763.

4. On 13 February 1991, appellant filed a voluntary petition for reorganization (Bankr. No. 91-10798) under Chapter 11 of the Bankruptcy Code (Code), 11 U.S.C. §§ 101-1330. The following portions of the Code are relevant to this motion:

§ 362. Automatic stay

(a) Except as provided by subsection (b) of this section, a petition filed under [chapter 11] operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . . .

§ 1143. Distribution

If a plan requires presentment or surrender of a security or the performance of any other act as a condition to participating in distribution under the plan, such action shall be taken not later than five years after the date of the entry of the order of confirmation. Any entity that has not within such time presented or surrendered such entity's security or taken any such other action that the plan requires may not participate in distribution under the plan**.**

5. In view of the automatic stay imposed by 11 U.S.C. § 362, we dismissed ASBCA No. 42763 without prejudice on 22 November 1991.

6. On 16 December 1991, DFSC moved the Bankruptcy Court for relief from the automatic stay to permit setoff of prepetition debts (Motion for Relief from Automatic Stay, dated 16 December 1991). In the motion, DFSC asserted that appellant owed it $808,830.86 in prepetition claims, including $692,168.31 in excess reprocurement costs under the subject contract.

7. On 10 January 1992, the parties entered into a stipulation in Bankr. No. 91-10798 regarding DFSC's motion for relief from the automatic stay (Stipulation by Debtor and DFSC, entered 23 January 1992). The stipulation provided that DFSC could withhold $317,003.53 in prepetition payables due appellant pending a decision by this Board determining the existence and amount of excess reprocurement costs due DFSC under contract DLA600-90-D-0542.

8. On 10 September 1992, DFSC amended its proof of claim in Bankr. No. 91-10798, reducing the amount claimed for excess reprocurement costs under contract 90-D-0542 to $682,280.31 (Amended proof of claim, dated 10 September 1992).

9. On 10 September 1992, the contracting officer issued a decision demanding payment of excess reprocurement costs of $682,280.31. The decision advised appellant that DFSC intended to offset its claim against payables due appellant under DFSC contracts. (ASBCA No. 45414, R4, tab 49)

10. Appellant's second amended plan of reorganization in Bankr. No. 91-10798 was confirmed on 18 September 1992 (Order, dated 18 September 1992).

11. On 8 December 1992, appellant timely appealed the contracting officer's decision assessing excess reprocurement costs. The appeal was docketed as ASBCA No. 45414.

12. Appellant moved to reinstate ASBCA No. 42763, the default termination appeal, on 5 January 1993. We reinstated the appeal on 6 January 1993.

13. On 18 March 1993, the parties jointly moved to suspend ASBCA No. 45414 pursuant to Board Rule 30. We granted the motion in an unpublished order dated 30 March 1993. The dismissal order provided that the appeal was "dismissed without prejudice, subject to reinstatement within 90 days after the Board has decided ASBCA No. 42673."

14. Board Rule 30 provides, in part, as follows:

> Rule 30. Suspensions; Dismissal Without Prejudice
>
> . . . In certain cases, . . . the Board is unable to proceed with disposition [of docketed appeals] for reasons not within [its]

> control. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may . . . dismiss such appeals from its docket without prejudice to their restoration when the cause of the suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

15. In 1995, appellant filed suit in the Court of Federal Claims, alleging that the EPA clause in the contract was illegal. Since appellant did not disclose this claim during the bankruptcy proceedings, the Court barred the claim. *Phoenix Petroleum, Co.*, 40 Fed. Cl. 862 (1998). On appeal, the Court of Appeals for the Federal Circuit reversed and remanded, staying the proceedings in the lower court until appellant petitioned the Bankruptcy Court to reopen the bankruptcy and include the EPA clause claim in appellant's assets. *Phoenix Petroleum Co. v. United States*, 215 F.3d 1345 (Fed. Cir. 1999) (table).

16. We upheld the Government's termination for default of the contract on 11 April 1996. *Phoenix Petroleum, Co.*, ASBCA No. 42763, 96-2 BCA ¶ 28,284. The Court of Appeals for the Federal Circuit affirmed our decision on 11 April 1997. *Phoenix Petroleum Co. v. Department of Defense*, 113 F.3d 1255 (Fed. Cir. 1997) (table).

17. As a result of the appellate court's 1999 decision on the EPA clause, the Bankruptcy Court reopened Bankr. No. 91-10798 on 7 April 2000. The Bankruptcy Court's Memorandum and Order of that date stated, in part, as follows:

> Although Phoenix would prefer that I fix the government's allowed claim [for excess reprocurement costs], it is more appropriate that I permit [DFSC] the opportunity to have this issue resolved in a non-bankruptcy forum. Not only is such deferral consistent with the parties' conduct during the bankruptcy case, but it takes advantage of the expertise of another forum on questions surrounding government contract disputes and permits that forum to interpret its own orders and procedures.

(Memorandum and Order dated 7 April 2000 at 7)

18. On 19 June 2000, appellant filed a second chapter 11 case that was docketed as Bankr. 00-17786.

19. DFSC notified us of the Bankruptcy Court's 7 April 2000 Memorandum and Order on 15 June 2001 (Gov't letter of 15 June 2001). We thereafter restored ASBCA No. 45414 to our docket for the limited purpose of deciding the reinstatement issue.

20. On 25 September 2001, the Bankruptcy Court issued an order in Bankr. No. 00-17786 that provided, in part, as follows:

> 2. Consistent with the parties['] stipulation in the original Phoenix bankruptcy and this Court's Memorandum Opinion and Order of April 7, 2000, this Court shall defer to proceedings pending before the [ASBCA to determine DFSC's excess reprocurement cost claim] . . . . [T]o the extent applicable, relief from the automatic stay is granted so as to permit the exercise of such authority . . . .

(Order dated 25 September 2001)

21. On 16 October 2001, we directed the parties to show cause why ASBCA No. 45414 should not be barred. Both parties submitted briefs. On 20 November 2001, we requested the parties to supplement the record with any excuses they had for failing to timely seek reinstatement. Both parties replied.

22. On 10 December 2001, we received a letter from counsel to the Official Committee of Unsecured Creditors, arguing that we should not bar appellant from litigating ASBCA No. 45414 because it would harm the unsecured creditors.

DECISION

At the joint request of the parties, we dismissed ASBCA No. 45414 without prejudice on 30 March 1993 pursuant to Board Rule 30. The dismissal order stated that the appeal was "subject to reinstatement within 90 days after the Board has decided ASBCA No. 42763." ASBCA No. 45414 was the appeal from a contracting officer's decision assessing excess reprocurement costs, and ASBCA No. 42763 was the appeal from a contracting officer's decision terminating the underlying contract for default. Under Rule 30, the dismissal without prejudice was converted to one with prejudice on 10 July 1996, 90 days after our decision in ASBCA No. 42763. Neither party timely moved to reinstate the appeal. The motion presents three issues. First, which party was responsible for seeking reinstatement? Second, what is the legal effect of that party's failure to timely move for reinstatement? And third, if the appeal is barred, is there nonetheless good cause for reinstating the appeal?

Rule 30 authorizes us to suspend an appeal that cannot be processed for reasons that are beyond our control. Where the suspension has continued or may continue for an inordinate length of time, Rule 30 permits us to dismiss the appeal without prejudice. If not reinstated within three years, the dismissal is automatically deemed one with prejudice by operation of law. *Cosmic Construction Co.*, ASBCA Nos. 24014, 24036, 24316, 84-1

BCA ¶ 17,028 at 84,796-98. On occasion, we have tailored the reinstatement period to the particular circumstances of the case. *E.g., General Dynamics Corp.*, ASBCA Nos. 39500, 40995, 00-1 BCA 30,719 at 151,724 (upon removal of the cause of the suspension); *BMSI, Inc.*, ASBCA No. 41542, 94-3 BCA ¶ 27,034 (within two years of death of appellant's president and sole shareholder); *Dyson & Company d/b/a The Rayfrank Co*., ASBCA No. 27276, 83-2 BCA ¶ 16,620 (within seven months). Since we could not decide the excess reprocurement cost appeal (ASBCA No. 45414) until we decided the termination for default appeal (ASBCA No. 42763), our order provided that ASBCA No. 45414 had to be reinstated 90 days after we decided ASBCA No. 42763. We decided ASBCA No. 42763 on 11 April 1996 and, therefore, ASBCA No. 45414 was required to be reinstated by 10 July 1996.

On the first issue, we conclude that appellant had the responsibility for seeking reinstatement of ASBCA No. 45414 because it was the only party with an interest in challenging the amount of excess reprocurement costs claimed by the Government. All the Government had to do to have the contracting officer's decision on its claim become final and binding was to wait until 10 July 1996 when the dismissal without prejudice was deemed one with prejudice. Consequently, the Government was not under any obligation to seek reinstatement. By failing to timely reinstate ASBCA No. 45414, appellant allowed the contracting officer's decision assessing $682,280.31 in excess reprocurement costs to become final. Thus, to the extent appellant did not wish to have the contracting officer's decision become final and conclusive pursuant to 41 U.S.C. § 605(b), it was responsible for timely moving for reinstatement. *See Canadian Commercial Corp*., ASBCA No. 20512, 76-2 BCA ¶ 12,054 at 57,845 (Rule 30 dismissal not granted in premature excess reprocurement cost case when reprocurement contract had not been completed and the reason for the suspension was within the Government's control, because it would place the burden of timely reinstatement on the contractor).

As to the second issue, the legal effect of appellant's failure to timely seek reinstatement is that the contracting officer's decision became final and conclusive 90 days after our decision in ASBCA No. 42763. As we indicated in *Charles G. Williams Construction, Inc.*, ASBCA Nos. 51239, 51637, 99-2 BCA ¶ 30,409 at 150,338, a voluntary withdrawal and dismissal with prejudice "left appellant in the position of not having filed the appeal, and rendered the contracting officer's decision final and conclusive." *RXDC, Inc.*, ASBCA No. 33356, 88-2 BCA ¶ 20,738 at 104,784. Thus, the contracting officer's decision in ASBCA No. 45414 became final and conclusive on 10 July 1996.

With respect to the third issue, appellant has not demonstrated good cause for reinstating the appeal. Relying on the standard used for dismissals for failure to prosecute under Rule 31, appellant argues that the appeal should be reinstated because it did not engage in a "pattern of delay or contumacious or contemptuous conduct" (app. reply br. at 1). This Rule 31 standard has little, if any, application to a Rule 30 dismissal because the

latter is "self executing" and occurs "automatically" without Board intervention. We do not have a rule that specifically addresses relief from judgment. In such situations, we generally look to the Federal Rules of Civil Procedure and its interpretative case law for guidance. Under Fed. R. Civ. P. 60(b), which provides for relief from judgment, the criteria for granting relief is a balancing test: the need for finality is weighed against the need to render a just decision on the basis of all the facts. In making this determination, the federal courts consider such factor as whether relief was sought within a reasonable time, whether there was good cause for failing to act, and to what extent the other party will be harmed if the decision is reopened. *E.g. Bohlin v. Banning Co*., 6 F.3d 350, 356-57 (5th Cir. 1993). We consider appellant's motion for reinstatement to be analogous to a motion for relief from judgment under Fed. R. Civ. P. 60(b), and, therefore consider the criteria established under the rule as suitable for use in this case. Appellant's sole excuse is that it believed the Government was responsible for reinstating the appeal. However, neither ignorance of the rules nor the law constitutes good cause. *Ceridian Corp. v. SCSC Corp.,* 212 F.3d 398, 404 (8th Cir. 2000). We are also cognizant of the fact that this contract was awarded in 1991 and that almost six years have passed since our decision became final. Weighing all these factors, we conclude that appellant has not demonstrated good cause for reinstating the appeal.

The cases cited by appellant do not persuade us that we should reinstate the appeal. In *GSE Dynamics, Inc.,* ASBCA No. 24826, 82-2 BCA ¶ 16,059, we converted a Rule 31 dismissal with prejudice for failure to prosecute to one without prejudice to give effect to the *Fulford* doctrine. *See Fulford Manufacturing Co.,* ASBCA Nos. 2143, 2144, 20 May 1955, 6 C.C.F. ¶ 61,815 (contractor has the right to challenge propriety of default termination in connection with appeal from excess reprocurement costs). In this case, appellant had a full hearing on the merits of its termination for default appeal, including an appeal to the Court of the Appeals for the Federal Circuit, so reinstatement due to the *Fulford* doctrine is inapplicable. In *Cosmic Construction Co.*, ASBCA Nos. 24014, 24036, 84-1 BCA ¶ 17,028, we converted a dismissal with prejudice by expiration of three years without request for reinstatement under Rule 30 to one without prejudice, but the delay involved only three to four months and the default termination could be litigated under another appeal by virtue of the *Fulford* doctrine. The delay in this case is almost six years.

Appellant presents four subsidiary arguments. It asserts that DFSC did not incur any damages because appellant, as a minority contractor, was entitled to be paid a premium over market that DFSC did not have to pay the reprocurement contractors and that, in any event, DFSC's claim should be barred for laches and non-prosecution. In view of our ruling that the decision in ASBCA No. 45414 became final and conclusive on 10 July 1996, these arguments are moot. Appellant also asserts that the contracting officer's excess reprocurement decision violated the automatic stay provisions of the Code. The stipulation entered by the Bankruptcy Court on 23 January 1992 appears to have been intended to grant DFSC relief to pursue all the claims enumerated in its motion for relief from automatic stay, including ASBCA No. 45414. Appellant finally asserts that DFSC's claim is barred

by 11 U.S.C. § 1143, which establishes a five-year period for completing acts required to participate in distribution under the confirmed plan of reorganization. This is a bankruptcy issue which, in our view, should be presented to the Bankruptcy Court.

The motion is denied.

Dated: 9 April 2002

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

DAVID W. JAMES, JR.
Administrative Judge
Acting 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. 45414, Appeal of Phoenix Petroleum Company, rendered in conformance with the Board's Charter.

Dated:

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