

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Sykes Communications, Inc.) ASBCA Nos. 53842, 54077
)
Under Contract No. DASW01-99-C-0001)

APPEARANCE FOR THE APPELLANT: Jacqueline E. Chin Quee, Esq.
Brooklyn, NY

APPEARANCES FOR THE GOVERNMENT: COL Karl M. Ellcessor, III, JA
Chief Trial Attorney
CPT Peter G. Hartman, JA
Trial Attorney

Thomas B. Pender, Esq.
Chief Trial Attorney
Douglas R. Jacobson, Esq.
Trial Attorney
Defense Contract Management
Agency
Ft. Snelling, MN

OPINION BY ADMINISTRATIVE JUDGE JAMES ON
RESPONDENT'S REQUEST TO DISMISS FOR FAILURE TO PROSECUTE

This decision addresses appellant's failure to respond to the Board's Order to show cause why the captioned appeals should not be dismissed with prejudice.

STATEMENT OF FACTS (SOF)

1. ASBCA No. 53842 arose from Sykes Communications, Inc.'s (Sykes) appeal from the 4 April 2002 final decision of the Administrative Contracting Officer (ACO) asserting a government claim of \$19,364 for indirect costs reimbursed for fiscal year (FY) 1998 under the captioned contract, which the ACO determined were unallowable.

2. ASBCA No. 54077 arose from Sykes' appeal from the Contracting Officer's 22 October 2002 denial of Sykes' claim of 13 August 2001 under the captioned contract. Upon appellant's motion, the Board consolidated ASBCA Nos. 53842 and 54077.

3. On 12 January 2004 respondent submitted its first discovery requests to appellant under the foregoing appeals.

4. Protracted delays in appellant's response to those discovery requests prompted respondent to move to dismiss these appeals. On 1 September 2004 we denied that motion, because appellant's 18 August 2004 responses to the foregoing discovery requests cured its delinquency. *See Sykes Communications, Inc.*, ASBCA Nos. 53842, 54077, 04-2 BCA ¶ 32,743.

5. On 22 October 2004 respondent asserted that appellant's 18 August 2004 responses were "incomplete" or "utterly non-responsive," moved to compel further answers to 36 interrogatories and production of all the document requested by its 12 January 2004 discovery requests, a copy of which motion was sent to appellant's attorney, and cited respondent's attempts on 7, 9, 14, 21, 24, 28 and 30 September and 2 October 2004 to telephone appellant's attorney to resolve the alleged deficiencies in appellant's responses, including respondent's 24 September and 2 October 2004 letters to appellant. On 29 October 2004 the Board ordered appellant to respond to the 22 October 2004 motion to compel not later than 29 November 2004.

6. The Board received no response from appellant by 29 November 2004. On 21 December 2004 the Board ordered appellant, not later than 5 January 2005, either to respond to the foregoing motion to compel, or to show good cause why the captioned appeals should not be dismissed for failure to prosecute, and warned that if appellant failed to comply with that Order, the Board intended to dismiss the appeals with prejudice under Board Rule 31.

7. Appellant failed to comply with the forgoing show cause order. Respondent's 10 January 2005 letter, a copy of which was sent to appellant's attorney, requested the Board to dismiss the captioned appeals with prejudice.

DECISION

ASBCA Rule 31, Dismissal or Default for Failure to Prosecute or Defend, provides for issuance of an order to show cause why an 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 the prosecution . . . of an appeal." Our Rule 35, Sanctions, provides for discretionary sanctions when a party "fails or refuses to obey an order issued by the Board."

We recognize that a "dismissal with prejudice is a harsh measure operating as an adjudication on the merits, and we employ it sparingly." *See Generator Technologies*,

Inc., ASBCA No. 53206, 03-1 BCA ¶ 32,058 at 158,461, citing *David's Econo-Move, Inc.*, ASBCA Nos. 49105, 49562, 00-1 BCA ¶ 30,621 at 151,156. However, when there has been a failure to respond to an order to show cause, as in these appeals, we have dismissed appeals.

On the instant record, appellant's failure to respond to the government's motion to compel (SOF ¶ 5), its failure to respond to the Board's order to respond to that motion (SOF ¶ 6), and its disregard of the Board's 21 December 2004 order to show cause (SOF, ¶¶ 6-7), establish beyond cavil "a pattern of conduct constituting a failure to prosecute" these appeals. See *Tech-Tron Constructors*, ASBCA No. 46357, 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); *Generator Technologies, supra*.

These appeals are dismissed with prejudice pursuant to Rule 31.

Dated: 27 January 2005

DAVID W. JAMES, JR.
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 Order of Dismissal of the Armed Services Board of Contract Appeals in ASBCA Nos. 53842, 54077, Appeals of Sykes Communications, Inc., rendered in conformance with the Board's Charter.

Dated:

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