

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Sykes Communications, Inc.) ASBCA No. 54641
)
Under Contract No. DASW01-99-C-0001)

APPEARANCE FOR THE APPELLANT: Mr. Ray Sykes, President

APPEARANCES FOR THE GOVERNMENT: E. Michael Chiaparas, Esq.
Acting Chief Trial Attorney
Douglas R. Jacobson, Esq.
Trial Attorney
Defense Contract Management
Agency
Ft. Snelling, MN

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON DISMISSAL FOR FAILURE TO PROSECUTE

This decision addresses appellant's failure to respond to the Board's 5 December 2005 Order to show cause why the captioned appeal should not be dismissed for lack of prosecution.

STATEMENT OF FACTS (SOF)

1. ASBCA No. 54641 arose from Sykes Communications, Inc.'s (Sykes) appeal from the 8 April 2004 final decision of Contracting Officer Kathy Dobeck alleging a \$37,090 overpayment of Sykes' indirect costs for fiscal year 2000 (R4, tab 2).

2. The 7 June 2004 letter of Sykes' then attorney, Jacqueline E. Chin Quee, Esq., to the ASBCA gave notice of appeal of that CO's decision (R4, tab 4; Bd. corres. file).

3. The Board's 4 October 2004 letter to appellant noted that its complaint was overdue since 17 July 2004, and ordered appellant to file a complaint or to show cause why the appeal should not be dismissed for lack of prosecution. On 2 December 2004 appellant filed its complaint.

4. On 3 January 2005 respondent filed its answer, and on 11 January 2005 sent its first discovery request to appellant (Bd. corres. file, gov't letter of 22 February 2005).

5. Jacqueline Chin Quee's 6 April 2005 letter notified the Board and respondent that she no longer represented Sykes in the captioned appeal (Bd. corres. file).

6. On 12 April 2005 respondent moved to compel appellant to answer the government's 11 January 2005 discovery request (Bd. corres. file). Appellant did not respond to the government's discovery request or to that motion.

7. The Board's 8 July 2005 letter to Mr. Ray Sykes, President of Sykes, at his two last known business addresses, asked him to advise the Board who represented Sykes in this appeal. The letter was returned to the Board by the U.S. Postal Service marked "NOT DELIVERABLE AS ADDRESSED." (Bd. corres. file)

8. The Board's 5 December 2005 certified letter to Mr. Ray Sykes summarized the foregoing facts and stated:

Therefore, the Board hereby orders appellant, within 30 days after receipt of this Order, to show cause why the captioned appeal should not be dismissed for lack of prosecution. If appellant shall fail to comply with this Order, or this Order is returned undelivered, the Board intends to dismiss the appeal with prejudice under Rule 31 of the Board's rules.

That certified letter was returned to the Board by the U.S. Postal Service stamped "UNCLAIMED RETURNED TO SENDER."

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 requested 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."

Based on the foregoing facts, appellant's failure to respond to the government's motion to compel (SOF ¶ 6), its failure to respond to the Board's request for advice as to who represented appellant in this appeal (SOF ¶ 7), its failure to respond to the Board's 5 December 2005 order to show cause (SOF ¶ 8), and the repeated return of the Board's correspondence to appellant marked undelivered by the U.S. Postal Service (SOF ¶¶ 7-8), establish beyond cavil "a pattern of conduct constituting a failure to prosecute" this

appeal. See *Sykes Communications, Inc.*, ASBCA Nos. 53842, 54077, 05-1 BCA ¶ 32,864 at 162,853 and authorities cited therein (appeals dismissed for failure to prosecute due to protracted discovery delays and failure to respond to Board orders).

This appeal is dismissed with prejudice pursuant to Board Rule 31.

Dated: 1 February 2006

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 No. 54641, Appeal of Sykes Communications, Inc., rendered in conformance with the Board's Charter.

Dated:

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