

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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ZIOS Corporation ) ASBCA No. 56626  
 )  
Under Contract No. W911W4-08-P-0139 )

APPEARANCE FOR THE APPELLANT: Ms. Eileen Chu Hing  
President & CEO

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.  
Army Chief Trial Attorney  
Raymond M. Saunders, Esq.  
Deputy Chief Trial Attorney  
LTC Steven P. Cullen, JA  
Chief, Trial Team II  
CPT Bridget E. Keenan, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE SCOTT ON APPELLANT'S MOTION  
FOR RELIEF FROM JUDGMENT

By decision dated 5 January 2010, reported at 10-1 BCA ¶ 34,344, the Board denied ZIOS Corporation's appeal, processed under Board Rule 12.3, from the contracting officer's final decision terminating its contract with the United States Army's Information Security Command for cause. Under the contract, appellant was to secure CISCO SMARTnet equipment maintenance for the government. On 20 May 2010 the Board received appellant's "MOTION FOR MISTRIAL AND SETASIDE JUDGMENT FOR TAMPERING WITH THE RECORD: JUDGES'S COPY OF RULE 4 TAB K AND HEARING TRANSCRIPT."

Appellant alleges that, during the hearing, "it was discovered that the pages containing the invalid Cisco serial numbers and items not covered under a Cisco contract were removed" from the presiding judge's copy of tab K to appellant's Rule 4 file supplement (mot. at 1, ¶ A). Appellant accuses the government of removing the pages.

Appellant further contends that certain alleged sworn testimony by the contracting officer, by an employee in the office of the government's end user, and by appellant's representative in this appeal, Ms. Eileen Chu Hing, is missing from the hearing transcript, along with alleged commentary by government counsel concerning appellant's discovery responses. Appellant also alleges that Ms. Hing's testimony was altered "to say that Dave Kirchner called me" (mot. at 2, ¶ 10). Appellant accuses the government of tampering with the transcript.

Appellant's "RELIEF SOUGHT" is that the Board:

[E]nforce a mistrial and setaside judgment, remove the altered hearing transcript from the record, replace it with the original hearing transcript, and impose appropriate sanctions against the Defendant and any other penalties this Honorable Court deems appropriate for tampering with the record.

(Mot. at 2)

On 26 May 2010 the Board received the government's opposition to the motion, based upon the presiding judge's prior denial of appellant's earlier post-hearing, pre-decision, motion for sanctions, addressed below, which had advanced the identical tampering allegations. The government also continues to dispute the allegations.

#### APPELLANT'S PRIOR MOTION FOR SANCTIONS

The hearing in this appeal occurred on 25 August 2009. On 13 November 2009 the Board received appellant's "MOTION FOR SANCTIONS FOR TAMPERING WITH THE RECORD: JUDGES'S COPY OF RULE 4 TAB K AND HEARING TRANSCRIPT," dated 10 November 2009. In its "RELIEF SOUGHT" appellant asked the Board to:

[R]emove the altered hearing transcript from the record, replace it with the original hearing transcript, and impose appropriate sanctions against the Defendant and any other penalties this Honorable Court deems appropriate for tampering with the record.

(Mot. at 2) Except for the opening phrase in the title and relief portions of the motion, and its date, appellant's motion for sanctions was identical to the pending motion for a mistrial and to set aside the Board's judgment.

By order of 24 November 2009, the presiding judge denied appellant's motion for sanctions. Regarding appellant's contention that the government had tampered with appellant's Rule 4 file supplement, the judge stated:

At the hearing the...presiding judge used the supplement provided to the Board by appellant. The judge ascertained at the hearing that tab K of the Board's supplement did not contain certain material that was included in the copy appellant had provided to the government. The government acknowledged that its copy contained that material; appellant

gave the judge a copy of the missing material; the judge assessed that it was the same as that contained at tab K of the government's copy of the supplement; and, after appellant confirmed that the judge now had the correct material, the judge substituted the corrected tab K for the incorrect copy appellant had originally provided to the Board—all without objection by the government and with its full cooperation. (Tr. 61-63)

(Order at 1-2) The judge concluded that appellant's tampering accusation was groundless and denied its motion for sanctions against the government with respect to appellant's supplemental Rule 4 file.

Regarding appellant's contention that the government had tampered with the hearing transcript, the presiding judge stated:

Preliminarily, the presiding judge has read the transcript. While memory – including that of the presiding judge and of the parties – is not perfect, apart from some phonetic and other immaterial small errors, the transcript reports the testimony as the judge recalls it. In fact, much of the alleged testimony referred to by appellant appears to be contained in the transcript in one form or another. As two examples only, “hand shake” and “code of conduct” testimony, referred to in paragraphs B (6) and (8) of appellant's motion, were transcribed (tr. 301-02, 342-43). Appellant has not demonstrated that any testimony is missing from the transcript or has been altered. For example, it has not shown that the court reporting company's recording of the testimony differs from the printed hearing transcript.

Dispositively, the court reporting company, not the government, prepared the hearing transcript and provided it to the Board and to the parties. The court reporter's 16 September 2009 Certificate of Reporter certifies that the transcript is true, accurate and complete and that it was prepared by him from his verbatim recording. Appellant has not presented any evidence of tampering, let alone of how the government could possibly have tampered with the transcript.

(Order at 2) The judge found appellant's allegations that the government had tampered with the hearing transcript to be groundless and denied its motion for sanctions.

## DISCUSSION

There is no Board Rule that addresses the relief appellant seeks in its pending motion for a mistrial and to set aside the Board's judgment on the alleged ground that the government tampered with the record. Thus we look to the Federal Rules of Civil Procedure for guidance and treat appellant's motion as akin to one filed under FED. R. CIV. P. 60, Relief from a Judgment or Order. *Corners and Edges, Inc.*, ASBCA Nos. 55611 *et al.*, 10-1 BCA ¶ 34,326 at 169,531; *The Swanson Group, Inc.*, ASBCA No. 53254, 02-1 BCA ¶ 31,838 at 157,308. Appellant's contentions that the government deliberately tampered with the record in this appeal fall under Rule 60(b), Grounds for Relief from a Final Judgment, Order, or Proceeding, which provides in pertinent part:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

....

- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party.

Appellant's motion is timely under Rule 60(c)(1), which states in relevant part that motions under Rule 60(b)(3) must be made no more than a year after the entry of the judgment. Rule 60(c)(2) notes that the motion does not affect the judgment's finality or suspend its operation.

The Board has again reviewed the transcript and adopts the presiding judge's 24 November 2009 order. Either the alleged missing testimony is not missing, or appellant has not established that there was any testimony that was not transcribed. With regard to certain of appellant's allegations not addressed specifically in the judge's order, government counsel's alleged discovery observations appear to be contained in the record. Again, appellant has not established that any such comments were omitted. In any case, counsel's questions or commentary are not evidence. Concerning appellant's allegation that Ms. Hing's testimony was altered to say that Dave Kirchner called her, the transcript records her testimony in part as:

What was happening -- what was happening was Dave Kirchner called me out of the blue and said, which was very strange, he said I hear you won the INSCOM contract. What distributor are you using? He named three. And one of them was Ingram.

(Tr. 307) Appellant's allegation that the government altered this testimony is implausible and not credible.

DECISION

Appellant's motion for a mistrial and to set aside judgment is denied.

Dated: 1 June 2010

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CHERYL L. SCOTT  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

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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. 56626, Appeal of ZIOS Corporation, rendered in conformance with the Board's Charter.

Dated:

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