

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
Utility Construction Company, Inc.) ASBCA No. 57224
Under Contract No. W912PL-07-D-0044)

APPEARANCE FOR THE APPELLANT: Cynthia Malyszek, Esq.
Malyszek & Malyszek
Westlake Village, CA

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
John F. Bazan, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Los Angeles

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON
GOVERNMENT'S MOTION TO DISMISS FOR FAILURE TO PROSECUTE

The U.S. Army Corps of Engineers (government) requested an order to show cause why this appeal should not be dismissed with prejudice for failure to prosecute. The Board treated this request as a motion to dismiss with prejudice for failure to prosecute, and Utility Construction Company, Inc. (appellant or UCC) filed in opposition to the motion. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. Appellant filed this appeal on 5 May 2010, based upon the failure of the contracting officer (CO) to act on its certified claim dated 4 January 2010 in the amount of \$1,418,683.52.

2. On 9 July 2010, the government filed a motion to dismiss the appeal. Pursuant to Board order, appellant's response to the government's motion was due on 9 August 2010, and was extended to 24 August 2010 at the request of appellant. Appellant did not file its response by 24 August 2010, but filed its response on 7 September 2010, requesting leave to file out of time. The Board granted appellant's request. The government's motion to dismiss was denied. *Utility Construction Co.*, ASBCA No. 57224, 10-2 BCA ¶ 34,588.

3. On 13 May 2011, the government propounded to appellant Request for Admissions (RFAs), Interrogatories and a Request for Production of Documents (RFP) (mot., ex. 15). Appellant's discovery responses were due 27 June 2011. Board Rule 15. Appellant failed to file any objections or answers to this discovery by 27 June 2011, nor does it appear appellant sought a time extension for this purpose.

4. On 25 July 2011, appellant filed responses to the RFP and to the RFAs. No answers to interrogatories were provided (mot., ex. 17).

5. On 26 September 2011, the government filed a motion to compel the production of documents. On 27 September 2011, the government filed a motion to compel responses to interrogatories.

6. By order dated 4 October 2011, the Board ordered appellant to respond to the motions no later than 15 days from the date of the order, or by 19 October 2011. Appellant did not respond by 19 October 2011.

7. The Board conducted a telephone conference on 24 October 2011, which continued on 28 October 2011. A deposition schedule was issued by the Board,¹ and outstanding discovery was discussed. Prior to the latter conference, appellant sent written discovery responses to the government. Appellant's interrogatory answers were not signed under oath. Board Rule 15. Appellant maintained at the 28 October conference that its Rule 4 supplement responded to the government's document requests, but the government maintained that it had not received this supplemental file. Appellant's counsel represented at the conference that she would send copies of the Rule 4 supplement to the government and to the Board. This representation was confirmed by memo to the Board and the government dated 3 November 2011. Appellant's counsel represented in the memo that she was re-tabbing, numbering and copying the files for the Board and the government:

I apologize and am taking the effort to go through everything and make sure that the tabs and any notation to them match, so that is why it is taking so long. I will finish this asap because it is like starting from scratch and will send hardcopies to both the Board and Government. I am doing it personally, so it is correct. I will have it to both [sic] next week.

¹ The government asserts that appellant's counsel terminated the deposition of Ms. Suzette Nickum without cause. The parties have yet to brief this matter, and the Board is not prepared at this time to rule the deposition was terminated without cause.

(Bd. corr. ltr. dtd. 3 November 2011) The Board did not receive appellant's Rule 4 supplement the "next week," or at any time thereafter. According to the government, appellant provided a Rule 4 supplement to the government by email on 11 November 2011 in an untabbed and disorganized manner (mot. at 8, ¶ 25).

8. On or about 30 November 2011, appellant filed a motion for extension of time and continuation of the trial date of 27 February 2012.² The government opposed the motion. By order dated 8 December 2011, the Board granted appellant's motion in part. It denied appellant's motion for a 60-day time extension to take depositions of government fact witnesses; it granted appellant's motion for a 60-day time extension to file expert reports; it granted appellant's motion for a 60-day time extension to take the depositions of expert witnesses; and denied its motion for a 60-day trial continuance. The Board also ruled as follows:

(F) The Government's Motion to Compel Discovery

1. The government has moved to compel discovery and appellant has represented to the Board that it has provided discovery information to the government in response to the government's motion to compel.

2. If appellant's discovery responses are not responsive, the government shall file a renewal of its motion with the Board, setting forth with particularity, the current remaining disputes and the relief requested. The Board will allow appellant an opportunity to respond, and the Board will issue an order thereafter.

The government has not filed with the Board in accordance with ¶ (F)(2) above.

9. On 12 January 2012, roughly six weeks before the hearing, appellant filed a "Motion for a 90 Day Stay." Appellant asserted several reasons for the stay, including personal, family issues involving appellant's counsel; appellant's financial problems; and lack of payment from the client. Appellant's counsel asserted that it was "physically and financially (as well as emotionally) impossible to continue to represent the appellant through this difficult period." Appellant suggested the possibility of judgment on the record, a new trial date, or the possibility that appellant obtain new counsel.

² This was the second hearing date set for this appeal; the original hearing date of 5 December 2011 was changed at the request of the parties.

10. The government filed in opposition to a stay on 17 January 2012. By order dated 19 January 2012, the Board stated as follows:

The government's opposition is unclear. The government contends that it has been preparing for the hearing and that a hearing is necessary to observe witness demeanor ([opp'n] at 3), thereby suggesting that the hearing should be held as scheduled. However, thereafter, the government moves the [B]oard to "vacate the hearing and set a briefing schedule and hearing for default" ([opp'n] at 4).

Upon receipt of this Order, the government shall clarify, by facsimile, whether it is prepared to go to hearing, as scheduled, on 27 February 2012, or wishes to pursue other alternatives.

The government responded that its "first preference" was not to go to hearing, but to seek an order to show cause why the appeal should not be dismissed with prejudice for failure to prosecute under Board Rule 31.

11. By order dated 23 January 2012, the Board treated the government's request for an order to show cause as a motion to dismiss with prejudice for failure to prosecute under Board Rule 31; cancelled the hearing and deemed moot appellant's motion for a stay. The Board directed the government to file a memorandum of law and facts in support of its motion to dismiss and scheduled the briefing of the motion.³ The motion has been fully briefed by the parties.

DECISION

The government requested oral argument on its motion. We believe the parties' positions are adequately set forth on the record and oral argument is unnecessary. We deny the government's request for oral argument.

The government correctly asserts that appellant's motion for a 90-day stay of hearing expressed appellant's unwillingness to proceed to the hearing of 27 February 2012 to which it had previously agreed and which was the subject of the Board's pretrial order. However, appellant's motion did not assert that appellant declined or refused to prosecute this appeal as the government suggests; rather, appellant's counsel sought a stay, citing financial and other reasons. Appellant's motion for stay also proposed the

³ The government asserts in its motion that the Board directed the government to file a motion to dismiss. This is not correct. The Board directed the government to file a supporting memorandum to the motion to dismiss.

possibility of a record submission, a new trial date and additional time for appellant to obtain new counsel, if necessary. Setting aside the merits of appellant's grounds for stay, we believe that appellant's motion expressed a desire to prosecute this appeal. Accordingly, we deny the government's motion to dismiss for failure to prosecute on this ground.

In support of its motion to dismiss with prejudice the government cites a number of instances in which appellant failed to file documents in accordance with the Board's rules (SOF ¶¶ 3, 7). The government also asserts that appellant failed to comply with a number of Board orders (SOF ¶¶ 2, 6). We acknowledge the existence of these failures, but we are of the view that they do not support dismissal of the appeal with prejudice. The sanction of dismissal with prejudice is the severest sanction the Board can issue and should be reserved for cases where contumacious or contemptuous conduct is shown. *Sykes Communications, Inc.*, ASBCA Nos. 53842, 54077, 04-2 BCA ¶ 32,743 (counsel's late discovery response and failure to timely submit documents per Board orders did not show contumacious or contemptuous conduct to justify dismissal with prejudice). *Compare National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (dismissal of complaint affirmed due to party's flagrant bad faith and callous disregard of responsibilities). Appellant's conduct has not been shown to be of a contumacious or contemptuous nature.

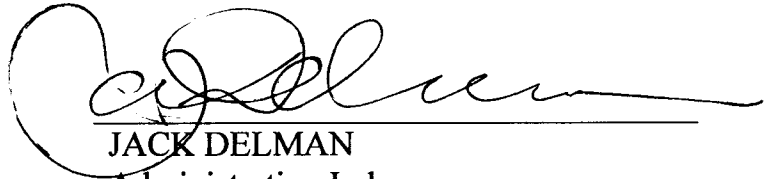
The government asks us to consider as contumacious or contemptuous appellant's counsel's misrepresentations to the Board. The record shows that appellant's counsel represented to the Board, both orally and in writing, that she was assembling appellant's Rule 4 supplement and that she would file the documents with the Board "next week." The Board did not receive these documents as promised. However, appellant's motion for stay later indicated that counsel was not getting paid by the client. Given these circumstances and based upon our review of the entire record, we believe that appellant's counsel did not intentionally or willfully mislead the Board, or otherwise engage in contumacious or contemptuous conduct (*but see below*).

CONCLUSION

Having concluded that appellant's conduct herein does not warrant dismissal of this appeal with prejudice, we need to impress upon appellant and its counsel that such behavior is nonetheless unacceptable, and should it continue it may subject appellant to a range of sanctions appropriate and necessary to this case. A contractor's financial difficulty is not license to frustrate the orderly processing of an appeal. The Board's rules provide inexpensive options for a party experiencing financial difficulty. Ignoring Board orders and rules is not one of those options.

We have duly considered the government's arguments and are not persuaded that they support dismissal of this appeal with prejudice. The government's motion to dismiss for failure to prosecute is denied.

Dated: 17 August 2012



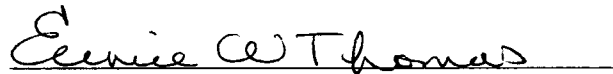
JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



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. 57224, Appeal of Utility Construction Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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