

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Government Technical Services, LLC) ASBCA No. 57744
)
Under Contract No. W912DY-05-D-0020)

APPEARANCE FOR THE APPELLANT: Howell Roger Riggs, Esq.
Huntsville, AL

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Kathryn R. Sommerkamp, Esq.
Engineer Trial Attorney
Margaret P. Simmons, Esq.
Center Counsel
U.S. Army Engineer District, Huntsville

OPINION BY ADMINISTRATIVE JUDGE WILSON ON APPELLANT'S MOTION
TO DISMISS WITHOUT PREJUDICE UNDER BOARD RULE 30

Government Technical Services, LLC (GTS or appellant) appealed the decision of the contracting officer terminating Task Order No. 0002 under the subject contract for default. For the majority of the time this appeal has been pending, GTS has been represented *pro se* by its president, Mr. Joseph Terry, who is currently under criminal indictment in United States District Court for the Northern District of Alabama. Appellant has moved that the Board suspend proceedings without prejudice pursuant to Board Rule 30 until the indictment can be resolved and has retained counsel for that limited purpose. We deem the motion to be one to dismiss the appeal without prejudice under Rule 30. The government opposes the dismissal contending, *inter alia*, that the Board should rule on its pending motion for summary judgment, as the contract at issue in this appeal is unrelated to the contract in the criminal case, and appellant has failed to show good cause for suspension of the proceedings under Board Rule 30. For the reasons stated below, appellant's motion is granted in part.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 4 January 2006, the U.S. Army Engineering and Support Center, Huntsville, Alabama (Corps or government), awarded a Multiple Award Task Order Contract to GTS for electronic security systems procurement and installation services and delivery of security and force protection measures to the Electronic Technology Systems Center, Engineering and Support Center, Huntsville, Alabama (R4, tab 1).

2. On 27 June 2007 the Corps awarded Task Order No. 0002 to GTS for the preparation of Access Control Points at Fort Rucker, Alabama, for installation of the U.S. Army Automated Installation Entry System (R4, tab 2).

3. By letter dated 1 June 2011, the contracting officer terminated the task order for default (R4, tab 20). Appellant filed a *pro se* notice of appeal with the Board, which was docketed as ASBCA No. 57744 on 19 August 2011. The parties agreed to have the appeal decided on the written record pursuant to Board Rule 11.

4. By letter dated 22 June 2012, the government requested a 90-day stay to allow time for the resolution of a fraud investigation of GTS and its president, Mr. Terry. The government contended that GTS's actions in connection with the subject contract were inextricably intertwined with the investigation. Accordingly, after receiving appellant's concurrence, the Board stayed the proceedings until 24 September 2012.

5. On 30 October 2012, Mr. Terry was indicted in the United States District Court for the Northern District of Alabama on numerous counts relating to alleged false statements in his application to obtain small business status (8(a)) from the Small Business Administration and further alleged fraudulent activity under a contract unrelated to the Fort Rucker contract that is the subject of this appeal.

6. By email dated 13 March 2013, Mr. Terry requested a stay of the matter until the pending indictment could be resolved, which he expected to be by July 2013. The Board, by order dated 24 April 2013, directed the parties to file a joint status report by 10 May 2013, to include a proposed Rule 11 briefing schedule for the disposition of the appeal. By letter dated 29 April 2013, the government filed a motion for summary judgment contending that appellant has provided no evidence to support its defenses to the default termination. Appellant has not yet replied to the motion.

7. By letter dated 9 May 2013, the government responded to the Board's direction for a status update. On 10 May 2013, the Board received appellant's "NOTICE OF LIMITED APPEARANCE OF COUNSEL" for purposes of responding to the Board's direction for a joint status report and to clarify appellant's request for the aforementioned stay. Counsel sought an extension of time to do so.

8. On 15 May 2013, appellant's counsel filed the instant motion to suspend the proceedings without prejudice pursuant to Board Rule 30 contending, *inter alia*: (1) appellant has a case before the United States Court of Federal Claims (COFC) arising out of the same contract, but under a different task order, that is currently stayed; (2) the government previously requested a stay in this appeal; and (3) Mr. Terry would be prejudiced by requiring him to waive his constitutional right to silence if he were

“deposed on the civil standard while a defendant in a criminal proceeding” (app. mot. at 2-3).

9. On 22 May 2013, the Board received the government’s opposition to the motion to suspend. The government contends that a ruling on its summary judgment motion would have no impact on appellant’s criminal trial and appellant has failed to articulate why the pending criminal case, previous government-requested stay, and the stay in the COFC matter provide good cause for suspension of this case (gov’t br. at 1-2).

DECISION

Board Rule 30 provides:

The Board may suspend the proceedings by agreement of counsel for settlement discussions, or for good cause shown. In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of 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 to be with prejudice.

As is apparent from the face of the Rule, a Rule 30 dismissal without prejudice or suspension of proceedings is discretionary with the Board. *Pratt & Whitney Rocketdyne, Inc.*, ASBCA No. 58307, 13 BCA ¶ 35,259 at 173,064 (citing *Texas Engineering Solutions*, ASBCA No. 53669 *et al.*, 04-1 BCA ¶ 32,550, and *Readiness Management Support, L.C.*, ASBCA No. 55880, 07-2 BCA ¶ 33,719).

Based on the fact that appellant is *pro se* and currently embroiled in a criminal matter that would not allow Mr. Terry to effectively pursue this appeal, we believe that a dismissal pursuant to Board Rule 30 is appropriate. Upon consideration of the government’s position and the previous stay in these proceedings, we conclude that a one year dismissal without prejudice is adequate. In view of our decision, we table the government’s pending motion for summary judgment unless and until such time as the appeal is reinstated.

CONCLUSION

Accordingly, the above appeal is dismissed without prejudice pursuant to Board Rule 30. Unless either party or the Board acts to reinstate the appeal within one year from the date of this decision, the dismissal shall be deemed with prejudice.

Dated: 21 June 2013



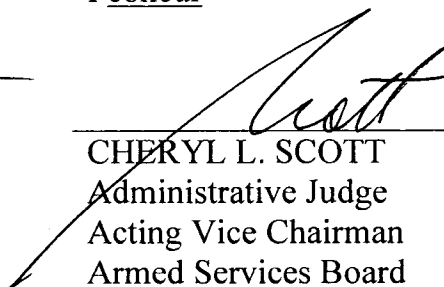
OWEN C. WILSON
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



CHERYL L. SCOTT
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. 57744, Appeal of Government Technical Services, LLC, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals