UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR FAILURE TO PROSECUTE DENIED;
SANCTIONS IMPOSED: October 27, 2009

CBCA 1544

MEDTEK, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Michael T. Farrell of Farrell Law Firm, Media, PA, counsel for Appellant.

Kate Gorney, Office of the Regional Counsel, Department of Veterans Affairs, Philadelphia, PA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **STEEL**, and **SHERIDAN**.

DANIELS, Board Judge.

There are consequences to an appellant's failure to comply with discovery orders, even where the party's actions demonstrate an interest in pursuing a case.

Background

Medtek, Inc. (Medtek) entered into two contracts with the Department of Veterans Affairs (VA) for the renovation of the third and fourth floors of the Philadelphia, Pennsylvania, Veterans Affairs Medical Center. With regard to the contract for renovation of the third floor, Medtek "claims that it incurred $410,000 in additional expenses to correct a design defect caused by [VA's] engineer, loss of revenue and the necessary legal expenses

that [Medtek] had to incur to defend its position." Complaint ¶ 4. The contracting officer denied this claim, and Medtek appealed.

Specifically, Medtek lists the following elements of its claim:

--	Colonial Surety legal fee	$117,917.53
--	Cohen & Seglas legal fee	97,620.55
--	Nitti & Nitti legal fee	2,610.00
--	Medtek, Inc. loss	135,265.92
--	UPS transformer	20,586.00
--	CMS construction supervision fee	24,000.00
--	Jerry Smith Electrician	12,000.00

On June 17, 2009, VA sent to Medtek, then represented by counsel, written discovery requests. These requests included fifteen interrogatories, fifteen requests for admission, and ten requests for the production of documents. Each of these requests was designed to elicit information related to the elements of Medtek's claim. Under the Board's Rules of Procedure, any objection to any of these requests had to be filed within fifteen calendar days after receipt, or by July 2, 2009, and Medtek had to "fully respond to any discovery request to which it [did] not file a timely objection." Rule 13(f)(2) (48 CFR 6101.13(f)(2) (2008)). Also under the Board's Rules, those full responses had to be made within thirty days after Medtek received the requests, or by July 17, 2009. Rules 14(a) (interrogatories), (c) (requests for admission), (d) (requests for production of documents).

On July 30, government counsel wrote to the contractor's attorney as follows:

> I have not received any responses to the Agency's discovery requests that were served on you on June 17, 2009. Please send your responses to me as soon as possible. If I do not receive any response from you by August 7, 2009, [I] will have to contact the judge regarding this matter.

By August 24, no responses had been forthcoming. On that date, VA filed a motion to compel discovery. By this time, however, the attorney engaged by Medtek had ceased to represent the contractor in this case.

On September 2, Medtek's attorney, newly re-engaged, acknowledged in a telephonic conference that responses to the agency's discovery requests were tardy and promised to provide them no later than September 11. Government counsel said that if the responses were indeed provided by that date, she would not require a ruling on the motion.

On September 21, however, government counsel reported that she still had not received any responses to her discovery requests. The Board convened a telephonic conference on September 23 to discuss the matter -- this time with Medtek's president, since the attorney had for a second time withdrawn from the case. At this conference, the Board granted VA's motion to compel, directing Medtek to respond to the June 17 discovery requests -- as well as a second set of interrogatories, which had been sent on September 4 -- by October 7. We informed the parties that if the order was not complied with, we would look favorably on a motion by VA to dismiss the case for failure to prosecute.

Medtek did not comply with our September 23 order granting VA's motion to compel; it did not respond to any of the discovery requests by October 7. On October 8, VA filed a motion to dismiss the case for failure to prosecute.

On October 9, Medtek sent to VA its responses to the agency's interrogatories and requests for admission. It did not send any documents responsive to the requests for production. Many of the responses were incomplete. For example, in response to an interrogatory which asked, "To the extent that you are claiming any damages based on not being able to take on new or additional work until this project was completed, please indicate what damages you are claiming," Medtek answered, "Medtek, Inc. loss in the value of $135,265.92," without providing any explanation of how that figure was constructed. Some other responses are unintelligible. For example, in response to an interrogatory which asked a series of questions about UPS equipment, Medtek answered, "Vygysguy."

On October 13, Medtek's attorney -- now back on the case for the third time -- filed an opposition to VA's motion to dismiss. He asked us to excuse his client's having failed to comply with the Board's September 23 order as "inadvertent" and resulting from the client's having "misunderstood the due date" and having proceeded pro se. Counsel also noted that responses to the discovery requests had been filed.

The Board convened a telephonic conference on October 14 to discuss VA's motion to dismiss. VA counsel asked for a ruling on this motion. Medtek's attorney opposed the request. He acknowledged that he had not yet seen his client's discovery responses and asked for an opportunity to cure the defects in them which were noted by agency counsel. The Board directed that complete responses be submitted to the agency, with a copy to the Board, by October 21.

On October 22, VA informed the Board that Medtek had not complied with the October 14 order. Counsel again asked for a ruling on the motion to dismiss, maintaining that the agency's ability to prepare adequately a motion for summary relief is prejudiced by the contractor's failure to answer the discovery requests. Medtek's attorney objected that

granting the motion is excessive; he offered to accept as a sanction the inability to make any objection to any of the discovery requests. He again promised to send complete answers to the requests as soon as possible.

Discussion

Board Rule 33(c), Sanctions, provides:

> When a party or its representative or attorney . . . fails to comply with any direction or order issued by the Board (including an order to provide or permit discovery), or engages in misconduct affecting the Board, its process, or its proceedings, the Board may make such orders as are just, including the imposition of appropriate sanctions. The sanctions may include:
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> (3) Refusing to allow the disobedient party to support or oppose designated claims or defenses;
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> (4) Prohibiting the disobedient party from introducing in evidence designated documents or items of testimony;
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> . . . .
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> (6) Dismissing the case or any part thereof;
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> . . . . ; or
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> (8) Imposing such other sanctions as the Board deems appropriate.

As this rule makes clear, the Board has the power to dismiss a case for failure to prosecute. This sanction has been described as "harsh" and "severe," however, so we employ it sparingly. *Kadin Corp. v. United States*, 782 F.2d 175, 176 (Fed. Cir. 1986); *Griffin & Dickson v. United States*, 16 Cl. Ct. 347, 351-52 (1989) (opinion by Judge Rader); *Rowe Inc. v. General Services Administration*, GSBCA 14136, 98-2 BCA ¶ 29,951, at 148,183; *Old Dominion Security, Inc. v. General Services Administration*, GSBCA 12974, 95-1 BCA ¶ 27,442 (1994). It is reserved for egregious situations, where parties have repeatedly failed to comply with the tribunal's orders. Willful disobedience of orders and prejudice to the opposing party have generally been found as reasons for dismissing a case for failure to prosecute. *McZeal v. Sprint Nextel Corp.*, 2009 WL 1706576 (Fed. Cir. June 18, 2009)

(applying law of 5th Circuit); *Adkins v. United States*, 816 F.2d 1580, 1582 (Fed. Cir. 1987); *Griffin & Dickson*, 16 Cl. Ct. at 352; *Corners & Edges, Inc. v. Department of Health & Human Services*, CBCA 1322, 09-1 BCA ¶ 34,051.

Medtek has repeatedly failed to comply with the Board's orders, has made unpersuasive excuses for its delinquencies, and has confused the proceedings by its on-again-off-again relationship with its attorney. Nevertheless, the contractor has provided some responses to VA's discovery requests. While those responses have been tardy, and some have been incomplete or unintelligible, they have manifested some interest in continuing to move the case toward a resolution on the merits. Accordingly, we believe that dismissing the case for failure to prosecute would be an excessive sanction at this time.

Although Medtek's actions are not worthy of dismissal of the case, they have delayed progress toward resolution of the matter and have not materially assisted VA or the Board in understanding the basis of the claim. These actions (or inactions) do merit consequences. The sanction proposed by the contractor's attorney, restricting the ability to object to discovery requests, is meaningless; the time for making such objections passed long ago, on July 2, 2009. (We do appreciate counsel's predicament, however; he has been trying to satisfy the Board's orders, but his client has made representation extremely difficult.)

Decision

We impose instead the following sanctions:

1. Because Medtek has not responded to any of VA's requests for the production of documents, notwithstanding the Board's order compelling such responses, Medtek may not introduce into evidence any documents which may be responsive to those requests.

2. Because Medtek has not revised its answers to VA's first set of interrogatories and VA's requests for admission, notwithstanding the Board's direction that it make those answers complete and intelligible, Medtek may not present any evidence which is in significantly greater detail than the answers it provided to those interrogatories and requests.

3. Because Medtek has not responded to VA's second set of interrogatories, notwithstanding the Board's order compelling such responses, Medtek may not present any evidence which would be responsive to those interrogatories.

As stated above, VA's **MOTION TO DISMISS FOR FAILURE TO PROSECUTE IS DENIED**.

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STEPHEN M. DANIELS
Board Judge

We concur:

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CANDIDA S. STEEL
Board Judge

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PATRICIA J. SHERIDAN
Board Judge