



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR FAILURE TO PROSECUTE: April 21, 2010

CBCA 821, 1891

CCJN & COMPANY, ARCHITECTS & PLANNERS, P.C.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

William C. Codd of the Law Offices of Alice K. Berke, P.C., Albany, NY, counsel for Appellant.

Heather R. Cameron and Leonard E. Lucas III, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **STERN**, and **HYATT**.

SOMERS, Board Judge.

Pending before the Board is a motion by the General Services Administration (GSA or the Government) to dismiss CBCA 821 (later combined with CBCA 1891) for failure to prosecute, or, in the alternative, to compel discovery with sanctions. On March 11, 2010, the Board convened a telephonic conference to discuss combining the appeals and the pending motion to dismiss. The Board advised appellant's counsel that it would be issuing a show cause notice. The Board issued on March 12, 2010, an order to show cause why the appeals should not be dismissed, and ordered appellant to respond by April 2, 2010. After considering appellant's untimely filed response and respondent's reply to appellant's response to the order to show cause, we grant the motion and dismiss the appeals for the reasons explained below.

Background

GSA entered into a contract with CCJN & Company, Architects & Planners, P.C. (appellant or CCJN) in May 2006, for the renovation of a parking garage at the federal building in Albany, New York. Appeal File, Exhibit 1.¹ As a condition of contract award, CCJN provided performance and payment bonds issued by American Contractors Indemnity Company (the surety). Exhibit 16. GSA issued a notice to proceed on July 6, 2006, following receipt of the bonds. Exhibit 17. The notice to proceed provided for 100 calendar days for project completion. *Id.*

On April 17, 2007, GSA terminated CCJN's contract for default. Exhibit 348. CCJN filed its notice of appeal on the termination on July 19, 2007. Exhibit 349. This appeal has been docketed as CBCA 821.

On July 24, 2007, GSA entered into a takeover agreement with the surety. Exhibit 350. Under the terms of the takeover agreement, the surety agreed to perform the remainder of the contract not completed by CCJN in exchange for payment of the balance of the contract funds. *Id.* at 2.

In its initial complaint in CBCA 821, CCJN alleged that the termination was improper and included in its complaint a claim for \$604,490.96 "for payments due from GSA" at the time of termination. CCJN later amended its complaint to include an additional \$1,101,500 for costs incurred by "CCJN's Surety to complete the Contract as a result of the GSA's wrongful termination."

Proceedings Leading to Order to Show Cause

Initially, progress of the appeal moved along at a fairly normal pace. The Government submitted the appeal file, appellant filed its complaint, the Government filed its answer, and, after the initial scheduling conference, the Board issued its first scheduling order, which stated that discovery must be completed no later than October 6, 2008, and scheduled trial to begin on November 3, 2008.

Over the next several months, the parties agreed to suspend proceedings while the surety completed the project. Appellant intended to amend its complaint to include the surety's claims. Ultimately, on September 10, 2008, at appellant's request, the Board issued an amended scheduling order permitting appellant to file an amended complaint by

¹ All exhibits are contained within the appeal file, unless otherwise referenced.

October 17, 2008, stating that discovery must be completed by May 15, 2009, and setting trial to begin on June 2, 2009. The Board directed the parties to file a joint status report every thirty days.

On October 29, 2008, the Board granted appellant's request for an enlargement of time to file an amended complaint. Appellant filed the complaint by the prescribed date, and respondent timely filed its answer.

Subsequent to that time, appellant failed to prosecute its case. On February 23, 2009, respondent submitted its first set of discovery requests to appellant. Appellant has not responded to those requests. On April 3, 2009, GSA filed a motion to dismiss the monetary aspect of appellant's claim for lack of jurisdiction, because CCJN had failed to submit a claim for monetary damages to the contracting officer. Appellant submitted several requests for an enlargement of time within which to respond to the pending motion. In April 2009, appellant's then-counsel advised the Board that appellant might be filing for bankruptcy. Ultimately, counsel moved to withdraw as counsel in the case, and the Board granted that motion.

By letter dated May 15, 2009, appellant's president requested additional time to respond to the pending motion to dismiss and to engage new counsel. The Board granted appellant's request; we set the deadline for appellant to respond to the pending motion as August 28, 2009, and suspended any other actions in the case until September 1, 2009.

On August 10, 2009, appellant advised the Board that it had engaged new counsel, the Law Offices of Alice K. Berke, P.C. On August 28, 2009, appellant's president sent an e-mail message to the Board stating that he was out of the country and was not expected to return for several weeks. Meanwhile, respondent's counsel contacted the law firm identified by appellant's president and left several messages for Ms. Berke concerning the case. Ms. Berke's office did not respond to the messages, nor did it advise respondent's counsel that it was not representing appellant at that time.

On September 2, 2009, the Board ordered appellant to respond to the Government's discovery requests, as well as the pending motion to dismiss, no later than October 2, 2009. On October 2, 2009, William C. Codd, Esq., of the Law Offices of Alice K. Berke, filed a letter with the Board stating that he had been retained by appellant on October 1, 2009.²

² Why appellant's counsel submitted his notice of appearance on October 2, 2009, stating that he had been retained on October 1, 2009, when appellant identified the firm as representing appellant on August 10, 2009, is unclear.

On October 13, 2009, appellant's counsel submitted a letter waiving appellant's right to file an opposition to the Government's motion and agreed that appellant had failed to submit a request for a final decision to the contracting officer.

On October 30, 2009, appellant submitted a claim to the contracting officer for monetary damages in the amount of \$604,490.96, as well as \$1,101,500 for amounts due and owed under the terms of the original contract. Appellant did not certify the claim, nor did it submit any documentation to support its claim.

On November 9, 2009, appellant submitted a revised claim. In that claim, appellant sought \$604,490.96 in costs and services rendered as of July 19, 2007. The president of CCJN submitted a purported certification with the claim, stating:

Charles C. Jon-Nwakalo, being duly sworn, deposes and says that he is the President of CCJN as referenced in the above-entitled Request for a Final Decision and that the foregoing is true to his own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters he believes them to be true.

Alice K. Berke, Esq., signed as notary on the certification. Once again, appellant did not submit any documents to support its claim.

The contracting officer denied appellant's claim by final decision dated November 24, 2009. By letter dated February 3, 2010, and received by the Board on February 19, 2010, appellant appealed the final decision and stated on the notice of appeal that it intended to move to consolidate the two appeals. The Board docketed the second appeal as CBCA 1891 on February 24, 2010. On that date, the Board issued an order on further proceedings directing appellant to file a complaint in the new appeal no later than March 30, 2010. By order dated March 11, 2010, the Board consolidated the appeals. The second order did not relieve appellant of the obligation to comply with the February 24, 2010, order and required that appellant file a complaint for CBCA 1891. Appellant failed to file this complaint.

By scheduling order dated December 2, 2009, trial was scheduled to commence on May 18, 2010. Discovery closed on April 5, 2010. Prehearing statements are scheduled to be submitted on or before May 4, 2010.

As noted previously, the Board held a status conference on March 11, 2010, at which time appellant's counsel stated that Mr. Codd would be unavailable for an extended period of time due to because he had been hospitalized. Contrary to these assertions, it appears from the documents submitted by Mr. Codd, and based upon the facts asserted by respondent's

counsel in respondent's reply to appellant's response to the order to show cause, Mr. Codd wrote letters and e-mail messages, and made telephone calls to respondent's counsel and to counsel for CCJN's surety during his alleged hospitalization.

Shortly after Ms. Berke told the Board that Mr. Codd was unavailable due to the alleged hospitalization, Mr. Codd filed a letter to the Board on March 24, 2010, requesting additional time to respond to respondent's motion to dismiss. In that letter, Mr. Codd stated that appellant would provide discovery responses to respondent no later than March 29, 2010. In response to the Board's order to show cause, appellant's counsel submitted its brief in opposition three days after the April 2, 2010, deadline. Appellant's counsel, Mr. Codd, stated in the brief that he could not return correspondence or telephone calls because he had been hospitalized from mid-January through mid-March 2010. Appellant represented that appellant's counsel had assured respondent's counsel that respondent would receive discovery responses by April 9, 2010. Respondent's counsel denies that this conversation occurred, and, in addition, states that as of April 9, 2010, respondent has not received any responses to discovery.

In sum, to date, appellant has failed to respond to pending discovery orders or to orders of the Board requiring the submission of pleadings. Most recently, appellant's counsel has failed to respond to telephone calls and letters from respondent's counsel.

Discussion

Board Rule 33(c), Sanctions (48 CFR 6101.33(c) (2009)), provides:

When a party or its representative or attorney or any expert/consultant 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:

....

(3) Refusing to allow the disobedient party to support or oppose designated claims or defenses;

(4) Prohibiting the disobedient party from introducing in evidence designated documents or items of testimony;

....

(6) Dismissing the case or any part thereof;

...; or

- (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 is reserved for egregious situations, where the party has repeatedly failed to comply with the tribunal's orders. Willful disobedience of orders and prejudice to the opposing party have generally been found to be sufficient reasons for dismissing a case for failure to prosecute. *Medtek, Inc. v. Department of Veterans Affairs*, CBCA 1544, 09-2 BCA ¶ 34,285 (citing *Griffin & Dickson v. United States*, 16 Cl. Ct. 347, 351-52 (1989); *Corners and Edges, Inc. v. Department of Health & Human Services*, CBCA 1322, 09-1 BCA ¶ 34,051); *see also Pacific Wildfire, LLC v. Department of Agriculture*, CBCA 664, 08-2 BCA ¶ 33,954.

CCJN and its representatives have repeatedly failed to comply with the Board's orders and with multiple discovery requests. In response to the order to show cause, appellant's counsel has failed to provide any satisfactory, or even believable, explanation for its failure to participate in Board proceedings. Parties have a duty to comply with the orders of the Board or to request appropriate, timely relief from those orders with which they cannot comply. Appellant has an obligation to diligently pursue the prosecution of its appeal in a timely, responsible manner or to bear the risk of having its case dismissed. Appellant has failed to comply with this obligation. Accordingly, the consolidated appeals are **DISMISSED FOR FAILURE TO PROSECUTE** pursuant to Rule 33(c)(6).

JERI KAYLENE SOMERS
Board Judge

We concur:

JAMES L. STERN
Board Judge

CATHERINE B. HYATT
Board Judge