



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: May 23, 2013

CBCA 2414, 2657

PROTEUS, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Leonard C. Parker, Director of Proteus, Inc., appearing for Appellant.

Ricarto Brazela, Office of the General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **McCANN**, and **WALTERS**.

BORWICK, Board Judge.

Respondent moves to dismiss these appeals for failure to prosecute, alleging a pattern of inaction and dilatoriness. For the reasons below, the motion is denied.

Background

CBCA 2414 and 2657 are construction cases that have been on the Board's docket since May 5, 2011. CBCA 2414 was docketed on May 5, 2011, and subsequently consolidated with the later-filed CBCA 2657. The cases involve the Department of Veterans Affairs (VA or agency), and Proteus, Inc., who entered into a construction project to correct

sidewalk subsidence at the VA Medicare Health System Center, Baltimore, Maryland. The claim, which is the same for both dockets, is for \$1,013,866 based upon alleged differing site conditions and alleged uncompensated change orders.

On January 31, 2013, appellant's counsel served notice that he wished to withdraw as counsel for appellant and act as counsel for a subcontractor and as special counsel for appellant presenting a pass-through claim of the subcontractor's pursuant to a liquidating agreement. Respondent's motion focuses on appellant's failure to comply with a Board order of March 27, 2013, requiring appellant to identify new counsel or a new representative by April 1, 2013. That order was preceded by a series of Board orders dated February 7, February 26, and March 5, 2013, dealing with the putative substitute representative as well as other issues. Appellant did not retain counsel or identify a corporate representative by April 1 as required by the order. Appellant's representative--one of its directors--entered his formal appearance as appellant's representative on April 3. He explained that appellant was encountering difficulty in retaining counsel given the then-scheduled trial date of July 8, 2013. Since April 3, appellant's director has fully participated in conferences with the Board, including establishment of a new schedule of proceedings.

The reason these cases have been pending for an inordinate length of time is a pattern of reciprocal inaction by both parties, including respondent's request for an extension of time to submit the appeal file and its two requests for extensions of time to submit its expert report.

The first request was based on a change in the VA's procurement procedure. The second request was based upon the hospitalization of the VA's expert.¹ Although the Board in its order of November 15, 2012, set a trial date of July 8, 2013, the VA advised the Board on April 15, 2013, that proceeding to trial on July 8 might not be possible.

Progress towards trial has been further delayed by the parties' mutual request for suspension of proceedings to allow for settlement negotiations. Settlement negotiations were held between May 23 and November 1, 2012, but proved fruitless.

As a result of these delays the Board issued an order on April 15, 2013, establishing new dates for the submission of expert reports, a new trial date of January 13, 2014, and a status conference on or after June 7, 2013, to discuss further settlement negotiations and the possibility of engaging in alternative dispute resolution procedures.

¹ Additionally, the VA lost the base contract against which tasks orders for project implementation were issued and has not been able to locate it.

Discussion

As appellant notes in its opposition, a dismissal for lack of prosecution requires a finding of an egregious situation where a party has repeatedly failed to comply with a tribunal's orders in a willful manner with prejudice to the opposing party. *CCJN & Co. Architects & Planners v. General Services Administration*, CBCA 811, et al., 10-1 BCA ¶ 34,420. The record here does not support a finding of appellant's contumacy; rather, the record shows a pattern of non-egregious, albeit frustrating, delay by both parties.

Decision

Respondent's motion to dismiss for failure to prosecute is **DENIED**.

ANTHONY S. BORWICK
Board Judge

We concur:

R. ANTHONY McCANN
Board Judge

RICHARD C. WALTERS
Board Judge