UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR FAILURE TO PROSECUTE: February 16, 2022

CBCA 5272

UNITED FACILITY SERVICES CORPORATION
dba EASTCO BUILDING SERVICES,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

William Weisberg of Law Offices of William Weisberg PLLC, McLean, VA, counsel for Appellant.

Brett A. Pisciotta and Kristi Singleton, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER**, **SHERIDAN**, and **ZISCHKAU**.

LESTER, Board Judge.

Pending before the Board is respondent's motion to dismiss this appeal for failure to prosecute, filed December 21, 2021. Despite several extensions of time, appellant, United Facilities Services Corporation, doing business as Eastco Building Services (Eastco), has yet to respond to a set of written interrogatories that the General Services Administration (GSA) served on May 6, 2021. The Board issued orders notifying Eastco that no further enlargements to respond would be granted, and a show cause order that required either a response or delivery of the interrogatory responses by December 17, 2021, went unanswered. Although Eastco recently requested yet another enlargement of time, it has made no

noticeable effort in the month since that request to respond to GSA's interrogatories. We grant GSA's motion to dismiss.

Background

I. Early Development of the Appeal

This appeal was filed on April 8, 2016, by Eastco's president. Eastco alleged that, when soliciting the contract at issue for operations and maintenance services at three federal buildings in Miami, Florida, GSA provided what was supposed to be a comprehensive list of equipment to be maintained. That list, Eastco alleged, failed to identify much of the equipment in the buildings that had to be maintained. Although the solicitation contained a site visit requirement and a disclaimer about the accuracy of the equipment or inventory list, Eastco alleged that some of the unlisted equipment was hidden above ceilings and in parts of the buildings that were difficult to access. Eastco claimed that all work it had to perform under the contract on equipment that was not listed constituted a constructive change, but it did not specifically identify the extra equipment that created extra work.

Soon thereafter, Eastco hired counsel to represent it in the appeal. Over the course of the next two years, the Board denied a motion from GSA to dismiss the appeal for lack of jurisdiction, the parties engaged in discovery, and the parties briefed cross-motions for summary judgment through which they sought, in part, the Board's view of the methodology that Eastco planned to use to prove entitlement and quantum. By decision dated July 2, 2018, the Board denied the cross-motions but indicated in its decision that, to prove its entitlement to damages, Eastco would have to produce certain information that was not currently in the record. *United Facility Services Corp. v. General Services Administration*, CBCA 5272, 18-1 BCA ¶ 37,086. Specifically, we held that, because of the combination of the site visit requirement in the solicitation and GSA's representation in the solicitation that the equipment list might contain errors, Eastco would have to show the extent to which it would not have discovered unlisted equipment, and what equipment it would not reasonably have been expected to discover, had it conducted a reasonable site visit. *Id.*

At the parties' request, the Board soon thereafter suspended proceedings to allow the parties to engage in settlement negotiations. After almost a year of negotiations, Eastco filed another motion for summary judgment, this one focused exclusively on the adequacy of the cost estimates upon which it planned to rely to support its claimed damages, the resolution of which Eastco asserted would help with settlement negotiations. Ultimately, by decision dated January 30, 2020, the Board denied Eastco's summary judgment motion and held that, to prove quantum, Eastco would have to produce direct, actual cost support to establish the costs that it incurred as a result of alleged changes, rather than the cost estimates upon which Eastco had planned to rely. *United Facility Services Corp. v. General Services*

Administration, CBCA 5272, slip op. at 9-11 (Jan. 30, 2020). The Board noted that Eastco's proposed cost estimates appeared untethered from, and in conflict with, available labor and cost records and that the record lacked evidence accurately comparing the amount of work that Eastco originally anticipated with what it actually performed. *Id.*

Development of this case stagnated after the Board's January 30, 2020, summary judgment decision. Soon after that decision was issued, Eastco changed counsel. GSA and the Board agreed to allow new counsel to become familiar with the case before Eastco had to continue with the discovery process. Subsequently, however, the Board was notified that both Eastco and its new counsel were unable to access their respective workplaces because of restrictions relating to the COVID-19 pandemic, a problem that the Board was informed continued for almost a year. Finally, on February 1, 2021, the parties jointly proposed a schedule of further proceedings in which fact discovery would conclude on April 30, 2021. The Board adopted that proposed schedule by order dated February 11, 2021. In response to a follow-on motion from Eastco, the Board issued orders on May 3 and 4, 2021, enlarging the time for the completion of fact discovery to June 29, 2021.

II. Developments Involving the Interrogatories Underlying GSA's Motion

On May 6, 2021, GSA served its second set of written interrogatories upon Eastco. In those interrogatories, GSA requested that Eastco provide an itemization and description of Eastco's alleged damages by date incurred, dollar amount, and category and the identities of the people or entities who provided the services, materials, or labor for which damages are claimed (interrogatory no. 6); information related to Eastco's efforts to mitigate damages (interrogatory no. 7); a description of how Eastco prepared its quote in response to GSA's solicitation, including the number of labor hours that Eastco anticipated for the contract work (interrogatory no. 8); information about the daily labor force at the contract sites, as well as comparisons, summaries, tabulations, and analyses comparing actual labor hours expended with labor hours originally anticipated (interrogatory no. 9); an identification of the equipment that Eastco contends was missing from the equipment inventory lists accompanying the solicitation by building name, room number, and location (interrogatory no. 10); an identification of all work that Eastco performed servicing or providing maintenance for that extra or unlisted equipment, as well as the costs incurred and labor hours expended in performing that work (interrogatory no. 11); an identification of any contemporaneous records showing time and cost for operating and maintaining the unlisted equipment and, if no such records were kept, an explanation of why they were not (interrogatory no. 12); and an itemization of all actual costs incurred to operate and maintain the unlisted equipment (interrogatory no. 13). Pursuant to Rule 14(b) of the Board's Rules (48 CFR 6101.14(b) (2020)), Eastco's response to those interrogatories was due by June 7, 2021, and, as noted above, discovery was scheduled to conclude on June 29, 2021.

In mid-May 2021, Eastco again changed the counsel representing it in this appeal. In its May 14, 2021, order granting Eastco's counsel substitution request, the Board specifically noted that, "[n]otwithstanding the substitution in counsel, the deadlines established in the Board's orders dated May 3 and 4, 2021, remain in effect."

By motion dated May 20, 2021, Eastco requested that the Board again enlarge the deadline for the conclusion of fact discovery, this time by an additional thirty days, to and including July 29, 2021, and the Board granted that unopposed request. Apparently, as part of that enlargement of the discovery deadline, Eastco and GSA agreed between themselves to extend the deadline for Eastco's responses to the May 6 interrogatories, as permitted by Board Rule 14(e).

Subsequently, by motion dated June 14, 2021, Eastco requested another sixty-day enlargement of the deadline for the conclusion of fact discovery in this appeal, to and including September 27, 2021. Although the Board granted that request, it noted that, in light of the lengthy history of this appeal, it did not anticipate granting any further enlargements of time:

> Although the Board is granting this enlargement request, the Board does not anticipate granting any further enlargements of time in this appeal. It appears that, for a significant period of time, there has been little, if any, case development. Eastco has changed counsel several times and, each time, seeks enlargements to allow its new counsel to become familiar with the case. Although the Board appreciates the difficulties that new counsel must have in learning about the dispute at issue here and the history of the litigation, the Board cannot simply continue to delay the resolution of this appeal because of choices that are wholly within Eastco's control. Accordingly, the parties should plan for this case to proceed to a hearing in early 2022. . . . The parties should plan accordingly.

Order (June 15, 2021) at 2. It appears that, with the extension of the discovery deadline, the parties again agreed between themselves to extend Eastco's deadline for serving its written interrogatory responses.

Despite the Board's warning, Eastco filed another enlargement request on September 28, 2021, after which the Board conducted a status conference, at GSA's request, on November 2, 2021, to discuss the status of discovery. At that conference, the parties explained that GSA has already completed its fact discovery production obligations, that Eastco will not depose any GSA employees, and that GSA is waiting for Eastco to complete its responses to GSA's second set of interrogatories (as well as potentially to produce some additional documents) before taking the deposition of Eastco's representative. Following

that conference, the Board set a deadline of November 16, 2021 – a deadline that Eastco indicated during the conference it could meet – for Eastco to respond to GSA's second set of written interrogatories and a November 30 discovery deadline.

Eastco neither met the November 16 deadline nor requested a further enlargement. When Eastco did not serve any interrogatory responses by that deadline, GSA told Eastco that it would forego complaining to the Board if Eastco could provide responses by November 23, 2021. Even then, responses were not forthcoming.

On November 29, 2021, at GSA's request, the Board conducted another status conference with the parties during which GSA complained about Eastco's continuing failure to respond to the second set of written interrogatories. GSA represented that, without complete discovery responses, GSA was not in a position to depose Eastco witnesses by the November 30, 2021, deadline set forth in the Board's November 2 order.

The Board issued a show cause order on December 1, 2021 (and a corrected order on December 2, 2021), directing Eastco to show cause no later than December 17, 2021, as to why the Board should not dismiss this action for failure to prosecute the appeal or to render adverse inferences against Eastco based upon its failure to respond to GSA's discovery. The Board directed that any such response detail the efforts that Eastco had made to respond to GSA's second set of interrogatories and explain why it had been unable to complete them. As an alternative, the Board indicated that, rather than filing a show cause response, Eastco could respond to GSA's second set of interrogatories by December 17, 2021, but would have to notify the Board that it had responded to the interrogatories in lieu of filing a show cause response. The Board represented in the order that no further enlargements of the deadline for responding to the second set of interrogatories would be entertained.

December 17 came and went without any response from Eastco. It neither filed a response to the Board's show cause order, nor served responses to GSA's second set of interrogatories.

On December 21, 2021, GSA filed its motion to dismiss this appeal for failure to prosecute, citing to Eastco's history of ignoring deadlines set by order of the Board and Eastco's failure to respond to GSA's second set of interrogatories. Eastco filed a response to the motion to dismiss on January 7, 2022, in which it "request[ed] (another) opportunity" to meet its obligations to prosecute its claim in "the form of a final resetting of the deadlines in this case." It asserted that "Eastco, a small business, has found it difficult to muster the internal resources to meet the various deadlines in the case," a difficulty "magnified by the ongoing impact of COVID-19, which has presented significant staffing and other operational issues for the company," as its staff of three people has "been focused on the existential issues of trying to keep the company in business during an extraordinarily difficult time."

Eastco requested that, if a further enlargement request was not granted, the Board select an alternative remedy to dismissal by "draw[ing] inferences from the specific discovery requests Eastco has not fulfilled, but not dismiss the case." Eastco asserted that "[a] significant amount of information has been provided, and Eastco believes that the parties can brief and argue from that, and the Board still render a decision." In its reply, GSA argues that, because of the breadth of the interrogatories that Eastco has failed to answer, any sanction limited to factual inferences against Eastco arising out of the unanswered written discovery requests would effectively require judgment in GSA's favor, making that option infeasible and warranting dismissal as a sanction.

Despite Eastco's request on January 7, 2022, for another chance to respond to the interrogatories, it has taken no noticeable action since that date to respond.

Discussion

I. The Merits of GSA's Motion to Dismiss

An appellant seeking to obtain monetary relief from the Government in an appeal before the Board "has an obligation to pursue the prosecution of its appeal in a timely, responsible manner or to bear the risk of having its case dismissed." *Pacific Wildfire, LLC v. Department of Agriculture*, CBCA 664, 08-2 BCA ¶ 33,954. If the Government submits a written discovery request, the appellant must either respond to the request or, if the request is objectionable, seek relief from the Board. The appellant may not simply fail to respond. Board Rule 14(b), (e); *see* 8B Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice & Procedure § 2291, at 638 (3d ed. 2010) ("[F]ailure to respond 'is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order.'" (quoting Fed. R. Civ. P. 37(d)(2))). Further, to the extent that the Board issues orders affecting the appellant's response obligations, the appellant has "a duty to comply with the orders of the Board or to request appropriate, timely relief from those orders with which [it] cannot comply." *Pacific Wildfire*.

Eastco has had more than nine months to respond to GSA's second set of interrogatories. It has never asserted that the interrogatories are objectionable or unduly burdensome. The Board, after granting several enlargement requests, ultimately set a deadline of November 16, 2021, for Eastco's responses. Eastco neither responded to the interrogatories by that deadline nor filed a motion identifying good cause for yet another extension of the response deadline. The Board then set a deadline of December 17, 2021, for Eastco to respond to a show cause order while offering Eastco the option of responding to the interrogatories instead but indicating that there would be no further enlargements of Eastco's time to respond to the interrogatories. Eastco did not respond.

Under Board Rule 35(b), the Board "may make such orders as are just, including the imposition of appropriate sanctions," if "a party or its representative . . . fails to comply with any direction or order of the Board (including an order to provide or permit discovery) or engages in misconduct affecting the Board, its process, or its proceedings." Sanctions available to the Board include "[t]aking the facts pertaining to the matter in dispute to be established for the purpose of the case in accordance with the contention of the party who is not at fault," "[f]orbidding the challenge of the accuracy of any evidence," "[r]efusing to allow the party to support or oppose designated claims or defenses," "[p]rohibiting the party from introducing into evidence designated claims or defenses," "[d]rawing evidentiary inferences adverse to the party," and "[d]ismissing the case or any part thereof." *Id.*

Rule 37(d)(1)(A)(ii) of the Federal Rules of Civil Procedure (FRCP) directly addresses a party's obligation to respond to written interrogatories and expressly allows a tribunal to order sanctions if "a party, after being properly served with interrogatories . . . , fails to serve its answers, objections, or written response."[1] Sanctions available under FRCP 37(d)(1)(A)(ii) for a complete failure to respond are consistent with those that Board Rule 35(b) identifies. The purpose of such sanctions is "to allow [tribunals] to punish a full and wilful noncompliance with the federal rules on discovery, and to deter such conduct in the future." *Minnesota Mining & Manufacturing Co. v. Eco Chem, Inc.*, 757 F.2d 1256, 1260 (Fed. Cir. 1985). While the Board might have to issue an order compelling corrections before sanctioning a party for providing *deficient* responses, imposition of sanctions under FRCP 37(d) in response to an appellant's complete *failure* to respond to interrogatories does *not* require a prior order from the Board compelling production. *Id.*; *see* 8B Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *supra*, § 2291, at 635-36 ("Only if a party wholly fails to respond to an entire set of interrogatories are sanctions under this rule appropriate.").

Although the boards of contract appeals "should employ severe sanctions, such as dismissal, with great circumspection and extreme care," *Griffin & Dickson v. United States*, 16 Cl. Ct. 347, 351 (1989), "[a] tribunal is afforded considerable discretion in determining whether sanctions are appropriate, and if so, what particular sanctions are appropriate under the circumstances of each case." *General Dynamics Ordnance & Tactical Systems, Inc.*, ASBCA 56870, 12-1 BCA ¶ 34,944. "The discovery provisions of the Federal Rules of Civil Procedure are designed to achieve disclosure of all the evidence relevant to the merits of a controversy." *Rates Technology, Inc. v. Mediatrix Telecom, Inc.*, 688 F.3d 742, 747 (Fed.

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[1] "When we are confronted with a matter about which our rules are silent, we look to the Federal Rules of Civil Procedure for guidance." *Chester B. Giffin*, GSBCA 7160, 84-2 BCA ¶ 17,449. We can look to FRCP 37(d) to determine the extent to which the Board can sanction a party for failing to provide any response to written interrogatories.

Cir. 2012) (quoting *Daval Steel Products v. M/V Fakredine*, 951 F.2d 1357, 1365 (2d Cir. 1991)). "When a party seeks to frustrate this design by disobeying discovery orders" or the discovery rules, "thereby preventing disclosure of facts essential to an adjudication on the merits, severe sanctions are appropriate." *Id.* (quoting *Daval Steel*, 951 F.2d at 1365). The most severe sanction, dismissal, may be warranted where "the failure of [the contractor] timely to respond to the interrogatories is patently willful and . . . no mitigating circumstances have been shown to justify any further extension of time for answers." *Allen v. United States*, 208 Ct. Cl. 958, 959 (1976); *see John P. Sanderson, III v. General Services Administration*, GSBCA 7958, 92-2 BCA ¶ 24,854 (applying FRCP 37(d) to dismiss appeal for failure to prosecute after appellant failed to respond to interrogatories).

Eastco failed to respond to GSA's interrogatories by the extended November 16, 2021, deadline and did not at that time seek an additional enlargement of time. Eastco then neither responded to the Board's subsequent show cause order by the December 17, 2021, deadline nor provided interrogatory responses by what the Board had indicated was a firm and final deadline. In such circumstances, Eastco has made clear that it will not prosecute this appeal. Accordingly, dismissal is warranted.

II. Eastco's Requests for Alternative Relief

On January 7, 2022, Eastco requested that the Board give it another chance and allow it, at some undefined date in the future, to respond to the interrogatories. Although we can sympathize with Eastco's assertion that the COVID-19 pandemic has been difficult for the company and has made it hard to muster resources to respond to GSA's interrogatories, Eastco does not explain in its last-minute request why it simply ignored the Board's prior orders requiring it to provide interrogatory responses by November 16 and to show cause by December 17, 2021. Its latest request is unsupported by any declarations from Eastco employees or by any explanation of what efforts, if any, Eastco has made to attempt to respond to the interrogatories. Given the history of Eastco's failed promises to respond to the interrogatories and the fact that, in the month since its most recent request for more time, Eastco has taken no noticeable action to respond, Eastco's empty assertion that COVID-19 has made it impossible for Eastco to develop even partial responses to the interrogatories for more than nine months (or to develop this litigation for almost two years) and that it might do better later rings hollow.

Eastco suggests that, as an alternative to dismissal, the Board could impose evidentiary sanctions by "draw[ing] inferences from the specific discovery requests Eastco has not fulfilled." The result would effectively be the same as a dismissal. GSA's interrogatories cover a broad spectrum of the causation and quantum aspects of Eastco's case. They are designed to identify Eastco's evidence and test Eastco's grounds in support of its claim. By completely failing to respond to the interrogatories, Eastco is precluding

GSA from developing defenses to Eastco's claim. Rebuttable inferences against Eastco in response to that failure are not enough. An appropriate evidentiary sanction for that failure would be to deem as admitted that, for unanswered interrogatories seeking the factual basis of specific arguments, there is no basis, and, for interrogatories seeking identification of documents and evidence, there are none. *Writing Co. v. Department of the Treasury*, GSBCA 15634-TD, 03-1 BCA ¶ 32,107 (2002). Here, that would mean that Eastco would be barred from detailing its alleged damages by date incurred, dollar amount, and category (interrogatory no. 6); from showing that it made any attempts to mitigate damages (interrogatory no. 7); from identifying the number of labor hours that Eastco originally anticipated for the contract work and how that compares to what it actually experienced (interrogatory no. 8); and from identifying the equipment that Eastco contends was missing from the equipment inventory lists and that it believes constitutes extra work (interrogatory no. 10). Eastco would also be barred from relying on contemporaneous time and cost records for operating and maintaining any unlisted equipment (interrogatory no. 12) and could not itemize actual costs incurred to operate and maintain that equipment (interrogatory no. 13). For the reasons that we explained in our prior summary judgment decisions, the absence of any such evidence would preclude Eastco from prevailing in this appeal. Accordingly, even if we were to allow this appeal to proceed while barring introduction of evidence responsive to GSA's interrogatories, Eastco, without any evidence of actual damages, could not prevail. In light of those circumstances, there is no point in continuing with this litigation.

Discussion

For the foregoing reasons, GSA's motion to dismiss is granted. This appeal is **DISMISSED FOR FAILURE TO PROSECUTE**.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

We concur:

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge