



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

---

MOTION FOR PARTIAL DISMISSAL DENIED: March 22, 2024

CBCA 8002

MLU SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Lochlin B. Samples of Smith, Currie & Hancock LLP, Atlanta, GA; and Allison Geewax of Smith, Currie & Hancock LLP, Tysons, VA, counsel for Appellant.

Andrew Michael Thabo Hickey, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER**, **RUSSELL**, and **SULLIVAN**.

**LESTER**, Board Judge.

The Federal Emergency Management Agency (FEMA) has filed a motion seeking to dismiss the portion of this appeal challenging the Government's affirmative monetary claim against appellant, MLU Services, Inc. (MLU). Four days before FEMA filed its motion, MLU missed a deadline for responding to FEMA's allegations in support of its government claim. We do not need the parties to brief FEMA's motion. It is denied.

### Background

In this appeal, MLU challenges a contracting officer's final decision in which the contracting officer both denied MLU's affirmative monetary claim of \$2.916 million and asserted a government claim demanding that MLU pay FEMA \$2.979 million. On January 25, 2024, MLU filed its appeal challenging the contracting officer's decision.

The Board issued an initial procedures order on January 30, 2024, directing MLU to file its complaint in the appeal no later than February 26, 2024, setting forth its monetary claims against FEMA in simple, concise, and direct terms. FEMA was directed to file an answer within thirty days after receiving MLU's complaint and, because the final decision at issue included FEMA's assertion of a monetary claim, to provide an addendum setting forth in simple, concise, and direct terms the basis of FEMA's monetary claim against MLU. Within fifteen days after FEMA filed its answer and addendum, MLU was to file a response to FEMA's addendum (in the form of an answer) addressing the allegations supporting FEMA's affirmative monetary claim.

Consistent with the Board's initial procedures order, MLU filed its complaint in this appeal on February 26, 2024. FEMA then filed its answer and addendum on February 29, 2024. Pursuant to the Board's initial procedures order, MLU's response to FEMA's addendum was due within fifteen days of the addendum's filing, or March 15, 2024. MLU did not file a response by that deadline.

On March 19, 2024, four days after the missed deadline, FEMA filed a motion to dismiss the portion of MLU's appeal challenging the Government's affirmative monetary claim, arguing that "Board precedent dictates that dismissal for failure to prosecute is appropriate when a party is unresponsive to an order requiring some action by them." Respondent's Motion for Partial Dismissal at 2. FEMA also argued that the Board "may impose sanctions, including dismissal, when a party or its attorney fails to comply with any direction or order of the Board." *Id.* FEMA further requested that, if the Board declined to grant the motion for partial dismissal, the Board should strike that part of MLU's notice of appeal challenging the agency's affirmative monetary claim; take the facts alleged in FEMA's addendum as conclusively established; prohibit MLU from opposing FEMA's monetary claim; prohibit MLU from introducing evidence relating to any claims or defenses to any part of FEMA's addendum; prohibit MLU from challenging the accuracy of any of FEMA's evidence related to facts that FEMA alleged in its addendum; draw evidentiary inferences adverse to MLU as they relate to any claims or defenses in FEMA's addendum; and impose such other relief as the Board deems appropriate. *Id.* at 3.

We do not need to await a response from MLU to FEMA's motion to dismiss, a motion which we view as bordering on frivolous, before addressing it.

### Discussion

“Dismissal for failure to prosecute is one of the harshest sanctions available to us[,] and, as a result, it is an option we use sparingly and only when the evidence presented in support of the motion is especially convincing.” *Property Maintenance Corp. v. Department of the Treasury*, GSBCA 12445-TD, 94-2 BCA ¶ 26,675, at 132,694; *see Roberts v. Ferman*, 826 F.3d 117, 122 (3d Cir. 2016) (“[D]ismissal for failure to prosecute ‘must be a sanction of last, not first, resort.’” (quoting *Knoll v. City of Allentown*, 707 F.3d 406, 411 (3d Cir. 2013))). It should be employed only in extreme situations, “when there is a clear record of delay or contumacious conduct and other less drastic sanctions have been unavailing.” *Western Pacific Construction, Inc.*, DOT BCA 2730, 96-2 BCA ¶ 28,584, at 142,712; *see Globe Disposal Co.*, VABCA 2213, 85-3 BCA ¶ 18,274, at 91,730 (finding dismissal for failure to prosecute appropriate “only where a party’s conduct shows a willful and contemptuous disregard of the Board Rules”). Further, although “the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing [does not] necessarily render such a dismissal void,” *Claude E. Atkins Enterprises, Inc. v. United States*, 899 F.2d 1180, 1185 (Fed. Cir. 1990) (quoting *Link v. Wabash Railroad Co.*, 370 U.S. 626, 632 (1962)), to satisfy due process concerns, “the record must show that the party upon whom the sanction of dismissal is to be applied was knowledgeable of the consequences of its actions.” *Western Pacific*, 96-2 BCA at 142,712 (citing *Link*, 370 U.S. at 632).

FEMA seeks dismissal of MLU’s challenge to its monetary claim solely because MLU did not file a timely response to FEMA’s addendum. The “sanction of dismissal . . . for failure to prosecute should not be imposed for a single instance of failure to comply with a Board order.” *Williamson v. Merit Systems Protection Board*, 334 F.3d 1058, 1063 (Fed. Cir. 2003) (citation omitted). Even the alternative “sanctions” that FEMA requests, which would effectively preclude MLU from contesting the merits of FEMA’s affirmative monetary claim, are an inappropriate response to the missed deadline. *See Refac International, Ltd. v. Hitachi, Ltd.*, 921 F.2d 1247, 1254 (Fed. Cir. 1990) (“Severe sanctions such as taking allegations as established . . . are authorized only in extreme circumstances” involving “willfulness, bad faith or fault.”); *see also Duffy Leasing Corp.*, PSBCA 3642, 94-3 BCA ¶ 27,100, at 135,044 (holding that the late filing of an answer “does not provide a basis for judgment in favor of [the complainant] where there has been no showing that [the] late filing prejudiced [the other party’s] ability to prosecute its appeal.”); *Gibmak Corp.*, ASBCA 7077, 1962 BCA ¶ 3436, at 17,619 (finding that the board’s rules did not contemplate precluding consideration of the merits of an appeal solely because the answer was not timely filed).

When an answer is not filed, a board may enter a general denial of the allegations in the complaint or, in this instance, FEMA’s addendum. *See, e.g., ANADAC Information Systems, Inc.*, GSBCA 10699, 91-1 BCA ¶ 23,384, at 117,351-52 (1990); *Hercules*

*Construction Co.*, VABCA 2625, et al., 1987 WL 46308 (Oct. 13, 1987); *Walber Construction Co.*, HUD BCA 79-385-C17, et al., 1982 WL 175910 (Sept. 2, 1982).<sup>1</sup> We elect to do so in the circumstances here. No sanction against MLU is warranted.

Decision

For the foregoing reasons, we enter a general denial on MLU's behalf of the allegations set forth in FEMA's addendum filed February 29, 2024. FEMA's motion for partial dismissal of this appeal is **DENIED**. The Board will schedule further proceedings in this appeal by separate order.

*Harold D. Lester, Jr.*

HAROLD D. LESTER, JR.  
Board Judge

We concur:

*Beverly M. Russell*

BEVERLY M. RUSSELL  
Board Judge

*Marian E. Sullivan*

MARIAN E. SULLIVAN  
Board Judge

---

<sup>1</sup> Prior to September 2018, the Board's Rules expressly provided that the Board could, if warranted, enter a general denial if no answer was timely filed. 48 CFR 6101.6(c) (2017). Although that language is not a part of the current version of the Board's Rules, which became effective September 17, 2018 (83 Fed. Reg. 41009 (Aug. 17, 2018)), "[t]he Board, under its inherent case management authority, has broad discretion to manage the litigation on its docket." *Golden West Refining Co.*, EBCA C-9208134, et al., 94-1 BCA ¶ 26,319, at 130,908 n.1 (1993).