



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED WITH PREJUDICE FOR FAILURE TO PROSECUTE: February 8, 2008

CBCA 104

McCLELLAN, M&M CONSTRUCTION,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Keysha Bailey, Owner/President of McClellan, M&M Construction, Carbondale, CO, appearing for Appellant.

Steven C. Silverman, Office of General Counsel, Department of Agriculture, Denver, CO, counsel for Respondent.

Before Board Judges **PARKER**, **POLLACK**, and **SHERIDAN**.

POLLACK, Board Judge.

On August 31, 2005, McClellan, M&M Construction (hereinafter M&M or appellant) filed an appeal from a July 12, 2005, termination for default issued by the Department of Agriculture, Forest Service (FS), Rocky Mountain Region, Golden, Colorado. The matter was initially docketed by the Department of Agriculture Board of Contract Appeals as AGBCA No. 2005-163-1. Appellant was represented by counsel. That appeal, as well as a second appeal, addressed later below, were ultimately consolidated into CBCA 104 when those matters were transferred to the Civilian Board of Contract Appeals (CBCA) on January 6, 2007, pursuant to Pub. L. No. 109-163, §§47, 119 Stat. 3136-95 (2006).

On September 26, 2005, appellant filed its complaint. The complaint asserted that the letter terminating the contract did not contain all the statements in Federal Acquisition Regulation (FAR) 49.402-3(g) (dealing with appeal rights) and, as such, it was not clear whether the notice terminating the contract was intended to constitute a final decision by the FS contracting officer (CO). Nevertheless, appellant proceeded with the appeal. The FS provided its answer.

On February 28, 2006, the Agriculture Board held a conference with counsel for the parties. Based on statements made by counsel for appellant, the board queried as to whether appellant had claims under the terminated contract that had not yet been submitted, but which could later become relevant to the proceedings. Appellant stated that it had such claims, specifically referencing a claim for alleged design problems. The claim, however, had not yet been submitted to the FS. In addition, appellant revealed that it had made a request for payment as to various invoices and that the CO had issued a final decision denying the release of the invoiced funds. As of the date of the conference, the board did not have that appeal in hand nor did it have a copy of the referenced final decision. Appellant stated that it intended to appeal the matter involving the invoices.

At the close of the conference, counsel for the FS indicated a potential willingness to discuss global issues, but stated that before moving forward, the FS needed to have appellant's full claim. The board then suggested that the parties first deal with securing that claim information and that the parties hold off any imminent proceeding on the default until all claims were submitted to and reviewed by the FS. Appellant's counsel, however, stated that while he would proceed to provide the information as to the non-submitted claims, appellant still wished to move forward with resolving the default and, as such, asked for the board to schedule a hearing. The board advised the parties that the hearing would be scheduled for some time in August 2006.

Within days of the conference, appellant filed the appeal as to the invoices. That appeal was dated February 27, 2006, and docketed by the Agriculture Board as AGBCA No. 2006-138-1. As noted above, the CO in his decision refused to release funds requested by appellant in various invoices. The CO explained that the money was being held pending determination of potential liabilities attributed to appellant. The referenced liabilities, however, were not specifically identified or quantified and the CO made no claim for such damages in the final decision.

The FS then filed an answer to the second appeal, and in that answer, the FS laid out counterclaims which were essentially setoffs to the money sought in the invoices. Although the counterclaim was set out in the answer, the FS had not addressed counterclaims in a CO's decision and, thus, the board did not have before it those matters.

As understood by the board, the parties continued to engage in contacts. By letter of June 1, 2006, counsel for appellant forwarded a letter to the board between it and the FS counsel, wherein appellant referenced its plan to discuss settlement and where it noted that it would need additional time to supplement the appeal file.

The situation soon changed significantly. By letter dated November 20, 2006, counsel for M&M sent a letter to the board in which counsel withdrew his representation of appellant. The withdrawal letter provided the board with the name and address of a representative of M&M for further communication. The board did not immediately hear from appellant. The board made several telephone attempts to contact M&M to find out the status of the appeals and to discuss how appellant planned to proceed. During the time period when the board attempted to contact appellant, the functions of the Agriculture Board were transferred to the newly created CBCA. Having received no response, the Board wrote to appellant by letter of February 12, 2007, and there again asked for appellant to contact the Board, noting that failure to respond could result in the appeal being dismissed.

The Board received no reply. Accordingly, the Board issued an order to show cause on March 9, 2007. On March 13, 2007, the Board received a letter from Ms. Keysha Bailey, Owner/President of M&M, notifying the Board that M&M was in the process of retrieving its case files from its withdrawn counsel. Ms. Bailey stated that appellant continued to want to pursue the matter and anticipated needing a year to retrieve files and to search for appropriate counsel.

On March 21, 2007, the Board issued an order staying the proceedings for six months, with the stay to terminate on September 20, 2007. The Board stated that if appellant needed more time, it was to advise the Board at least fifteen days prior to the expiration date. On September 27, 2007, not having heard from appellant, the Board issued a letter to appellant advising appellant that the stay had expired. The Board noted that it had tried to contact appellant by telephone but the contact numbers the Board had for telephone and facsimile were not viable. Appellant was directed to contact the Board. The above letter was sent via certified mail, return receipt requested. The Board received no receipt showing delivery, nor was the letter returned to the Board from the Postal Service.

Having still not heard from appellant and the stay having expired, the Board proceeded, on November 21, 2007, to issue an order to show cause. The order reviewed matters to that point in time and gave appellant fifteen days to show cause why the appeals should not be dismissed. Unlike the letter of September 27, 2007, the Board did receive a receipt showing delivery of the November order. The receipt was signed by Karen Bristol and showed the date of receipt as November 26, 2007. The Board awaited a reply. To date, the Board has received no reply to its order.

Decision

After numerous attempts to formally and informally contact appellant as to its intentions as to pursuing its appeals, the Board on November 21, 2007, issued a formal order to show cause notifying appellant that it had fifteen days to show cause why the appeals should not be dismissed. Appellant failed to respond, continuing a practice of not communicating with the Board. Accordingly, the appeals are **DISMISSED WITH PREJUDICE FOR FAILURE TO PROSECUTE**.

HOWARD A. POLLACK
Board Judge

We concur:

ROBERT W. PARKER
Board Judge

PATRICIA J. SHERIDAN
Board Judge