



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS IN LIEU OF ANSWER DENIED:
November 7, 2019

CBCA 6561

BES DESIGN/BUILD, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

David A. Horton, Daphne, AL, counsel for Appellant.

Mary A. Mitchell, Office of General Counsel, Department of Veterans Affairs,
Houston, TX, counsel for Respondent.

BEFORE Judges **GOODMAN**, **ZISCHKAU**, and **O'ROURKE**.

GOODMAN, Board Judge.

Respondent, Department of Veterans Affairs, has filed a motion to dismiss this appeal in lieu of an answer on the basis that appellant, BES/Design Build LLC, has failed to prosecute the appeal. We deny the motion.

Background

On September 25, 2019, the Board issued an order in response to good cause shown by appellant's counsel, extending the time for appellant to file its complaint until October 10, 2019. On October 21, 2019, appellant had not filed its complaint, and respondent filed a motion to dismiss with prejudice in lieu of answer, which reads in relevant part:

Respondent requests that the instant Appeal be dismissed under CBCA Rule 12(b)(4) for failure to prosecute the instant Appeal. The filing of a complaint is evidence of Appellant's intent to prosecute its appeal. Appellant's failure to file its complaint and failure to notify the Board or Respondent of a request to extend the time for filing of same makes clear Appellant's abandonment of the instant Appeal. "Under [former] Board Rule 33(c) (48 CFR 6101.33(c) (2016)), now CBCA Rule 35(b), the Board has the authority to dismiss a case for failure to prosecute where a party has repeatedly failed to comply with the Board's orders. *Elite Quality Services, LLC v. Department of Commerce*, CBCA 5050, 16-1 BCA ¶ 36,269; *Medtek, Inc. v. Department of Veteran Affairs*, CBCA 1544, 09-2 BCA ¶ 34,285; see *Kadin Corp. v. United States*, 782 F.2d 175, 176 (Fed. Cir. 1986). This is such a situation.

...

Alternatively, should the Board find that Appellant's failure to file its complaint does not equate to a failure to prosecute under CBCA Rule 12(b)(4), CBCA Rule 35(b) provides that "[i]f a party or its representative, attorney, expert or consultant fails to comply with any direction or order of the Board . . . the Board may make such orders as are just, including imposition of appropriate sanctions. Rule 35(b). Specifically, the Board may "include as a sanction dismissal of the case or any part thereof." CBCA Rule 35(b)(6).

On October 22, 2019, appellant filed its complaint with the Board. On October 31, 2019, respondent filed its answer, and included in its answer was an affirmative defense which reiterated its motion to dismiss as follows:

Appellant failed to respond to this Board's Order to file the Petition [sic] on or before October 10, 2019 and failed to provide just cause for its failure to comply with this Board's Order; thus, this Petition [sic] should be DISMISSED, WITH PREJUDICE.

Discussion

The cases cited in respondent's motion hold that dismissal for failure to prosecute is appropriate when a party has repeatedly failed to comply with the Board's orders. It is reserved for egregious situations, where parties have repeatedly failed to comply with the tribunal's orders. The circumstances of these cases include the Board's repeated attempts to contact a party with no response, followed by the party's subsequent failure to respond to a Board order directing a party to show cause why the case should not be dismissed.

The circumstances of the instant case do not justify dismissal. Appellant did not repeatedly fail to comply with orders of the Board, nor did the Board issue an order to show cause. Appellant's filing of the complaint eleven days after the extended time period did not prejudice respondent. Respondent has not stated sufficient grounds for dismissal for failure to prosecute.

Decision

Respondent's motion to dismiss is **DENIED**.

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge

We concur:

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU
Board Judge

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE
Board Judge