Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: December 4, 2002

GSBCA 15634-TD

THE WRITING COMPANY,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

Jerroll M. Sanders, President and CEO of The Writing Company, Clayton, MO, appearing for Appellant.

Donald M. Suica,[1] Beth B. Sturgess, and William R. Korth, General Legal Services, Internal Revenue Service, Department of the Treasury, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **HYATT**.

DANIELS, Board Judge.

Because the appellant has not responded to written discovery requests sent to it by the respondent, notwithstanding repeated direction by the Board to respond by a certain date, the Board grants the respondent's motion for sanctions. All requests for admission are deemed admitted, and the appellant is prohibited from introducing into evidence documents and other material which would be responsive to the requests for production and interrogatories.

The deemed admissions include statements that the appellant has been compensated for most of the costs it seeks through the filing of this appeal. No documents or other material may be introduced into evidence which support the claim for the remaining costs. Thus, some of the claim is admittedly without merit and the record contains no evidence on

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[1]Mr. Suica, who ably represented the Department of the Treasury before this Board for many years, passed away on November 22, 2002.

the basis of which we could grant any of the rest of the claim. We consequently grant the respondent's motion for summary relief and deny the appeal.

Background

1. On March 3, 1998, the Internal Revenue Service (IRS), a bureau of the Department of the Treasury,[2] awarded a time-and-materials contract for "assistance in rewriting, redesigning and testing [IRS's] CP [Computer Paragraph] Notices." The awardee was the Small Business Administration, with Jireh Consulting, Inc., doing business as The Writing Company (TWC), designated as subcontractor under the program authorized by section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1994). Appeal File, Exhibit 1 at 3, 18, 48.

2. As originally awarded, the contract was in an amount not to exceed $200,000 and provided that all work would be performed by July 31, 1998. Appeal File, Exhibit 1 at 2-5, 24. The maximum amount was increased on May 11, 1998, and again on September 28 and 30, 1998. Id. at 72-74, 76-90. On February 2, 1999, the contract completion date was set as October 1, 1999. Id. at 98-99.

3. The contract incorporated by reference a termination clause. Appeal File, Exhibit 1 at 34-35 (specifying 48 CFR 52.249-6 (Alternate IV) (SEP 1996) (1997)). Under this clause, the Government could terminate the contract at any time if the contracting officer determined that termination was in the Government's interest. If the contract was so terminated, the contractor was to submit a final termination settlement proposal to the contracting officer. The contracting officer was then to pay either an amount agreed upon or an amount which would include various categories of costs and a portion of the fee payable under the contract.

4. An IRS contracting officer terminated the contract for the convenience of the Government on February 24, 1999. Appeal File, Exhibit 5 at 1.

5. TWC submitted to the IRS a termination settlement proposal dated December 23, 1999. The proposal was in the amount of $526,802.07. Appeal File, Exhibit 2 at 3. The termination settlement proposal included both pre-termination and post-termination costs. Pre-termination costs included direct labor, overhead associated with direct labor, other direct costs (travel, telephone, and supplies; materials; and subcontractors), "changed timeline impact (delays)," legal fees, and profit. Post-termination costs included payroll cost, general and administrative expenses, unexpired lease cost, cost of settlement preparation, "cost of money – OH [overhead] and G & A [general and administrative expenses]," and profit. Id. at 4-5.

6. On March 3, 2000, the IRS made a partial settlement payment of $189,350 to TWC. Appeal File, Exhibit 1 at 100-02.

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[2]We refer to the respondent as "IRS" in this opinion.

7. On May 7, 2001, an IRS contracting officer issued a "Settlement by Determination" of the termination settlement proposal. In this document, the contracting officer awarded to TWC a total of $263,784.87. This amount is divided into the following categories: payroll cost, general and administrative expenses, unexpired lease costs, cost of settlement preparation, legal fees, and profit. Appeal File, Exhibit 1 at 103-13.

8. On July 26, 2001, TWC filed with this Board a notice of appeal from the Settlement by Determination, which both parties understand to be a contracting officer's decision.

9. The Board promptly issued a docketing order which directed TWC to file its complaint by August 30, 2001. Then began a long sequence of events in which the appellant either did not timely respond to Board orders, asked that proceedings be suspended, or both.

10. TWC did not file a complaint by August 30, 2001. On August 31, it asked the Board to convene a telephonic conference, and we complied with the request. At that conference, the appellant sought and the Board granted, without objection, a suspension of proceedings which would last until October 29. We required that the complaint be filed on October 29.

11. TWC did not file a complaint by October 29. Instead, on October 30, it filed a request that proceedings remain suspended for an additional six months. The appellant said that it did not have sufficient funds to retain counsel competent to protect its financial interest. Again, the request was unopposed and the Board granted it. We suspended proceedings until May 6, 2002, on which date TWC was to file its complaint. Our order stated, "The Board will not lightly entertain any request for further postponement of this case."

12. TWC did not file its complaint, or anything else, by May 6, 2002. On May 7, the Board ordered the appellant to show cause, no later than May 17, why the appeal should not be dismissed for failure to prosecute.

13. TWC did not timely respond to the show cause order, either. On May 20, it asked that the Board suspend proceedings. As it had the previous October, the appellant alleged that because of financial difficulties, it was "still unable to secure counsel to assist us with preparing the case."

14. Also on May 20, the IRS filed a motion to dismiss the appeal for failure to prosecute. In the motion, the agency contended:

> This is an appeal from a contracting officer's final decision issued over a year ago. For over a year, other than the notice of appeal, appellant has not filed any documents required to be filed under Board rules. Mover, appellant has failed to respond to Board orders in a timely [manner]. Appellant has purposefully neglected to request further suspensions until Board imposed deadlines have passed. Further, other than stat[ing] that it has had trouble securing competent legal representation, which is not required in order to pursue an appeal at the Board, appellant has failed to show adequate cause as

> to why it has not prosecuted this appeal or why it has continuously delayed this appeal. Appellant should not be permitted to indefinitely extend a proceeding by continuously requesting its suspension.

15. TWC responded by again asserting its financial inability to secure counsel to prosecute the case and by asking that "the Board suspend proceedings until Appellant can return to financial solvency and retain competent counsel" – "for years," if necessary.

16. On May 31, the Board denied the agency's motion to dismiss the case for failure to prosecute. In so doing, however, we noted that our duty is to provide "the expeditious, less formal, less expensive resolution of Government contract claims," S. Rept. No. 95-1118, at 23 (1978), reprinted in 1978 U.S.C.C.A.N. 5235, 5357. We noted additionally that in furtherance of this objective, we permit an appellant to appear in its own behalf, and if the appellant is a corporation or association, to appear "by one of its officers or by any other authorized employee." Board Rule 6(a)(1) (48 CFR 6101.6(a)(1) (2001)). The lack of counsel was therefore not good cause for delaying proceedings. We directed TWC to file its complaint by June 10.

17. On reconsideration, requested by the appellant, we on June 7 allowed the complaint to be filed as late as June 17 and said that if a complaint was not filed by that date, we would designate the appellant's notice of appeal as its complaint. We also listed the documents that the respondent had submitted in its appeal file and directed, "If appellant believes that the Board should consider, in resolving this case, documents in addition to those in respondent's appeal file, it should submit those documents, as exhibits in a supplemental appeal file, by July 17, 2002."

18. TWC filed nothing by June 17. On June 18, it made its very last filing in the case. It asked again that the Board reconsider its ruling denying an indefinite suspension of proceedings and concluded, "We prefer to have this case adjudicated in [another] judicial forum." In response, on June 20, we designated TWC's notice of appeal as its complaint, gave assurance that any schedule for further proceedings would permit the appellant to explain its position fully, and concluded, "If appellant 'prefer[s] to have this case adjudicated in [another] forum,' it may ask the Board to dismiss the case. We caution appellant, however, that if the case is dismissed and appellant files it in another forum, that other forum may not have jurisdiction to hear it – and even a refiling in this forum may be precluded for jurisdictional reasons (see Bonneville Associates, L.P. v. Barram, 165 F.3d 1360 (Fed. Cir. 1999))."

19. On June 26, we directed the parties to propose, by July 22, a schedule for further proceedings. The IRS timely responded, proposing a schedule which would culminate in the submission of briefs based on the written record. Although TWC did not respond to this order, the agency's response noted that the appellant requested a hearing on the merits of the case. The Board issued an order which essentially adopted the schedule proposed by the agency, but provided for a hearing as requested by the appellant. The order included this provision for written discovery:

> Each party may send to the other party interrogatories, requests for admission, and requests for the production of documents, all of which may address

matters relevant to the case. These written discovery requests shall be delivered no later than **Tuesday, October 8, 2002**. Any written discovery request timely delivered shall be responded to no later than **Thursday, November 7, 2002**.

20. Meanwhile, on July 17, the IRS filed a motion to dismiss for lack of jurisdiction the portion of TWC's notice of appeal/complaint which asks us to award "interest, taxes, and penalties" and "damages." We afforded TWC an opportunity to respond to the motion and made numerous telephonic attempts to remind the firm of this opportunity, but TWC did not respond. We granted this motion on August 22, based on a finding that TWC had never submitted a claim for any of the items in question. Writing Co. v. Department of the Treasury, GSBCA 15634-TD, 02-2 BCA ¶ 32,007.

21. On September 25, the IRS filed a motion for sanctions against TWC. As background, the IRS recited the history of TWC's tardy responses and lack of responses to Board orders which is set out in this decision. Then the IRS showed that it had sent to TWC on August 16 numerous interrogatories, requests for admission, and requests for the production of documents. The IRS represented that TWC had not responded to these written discovery requests, and that when agency counsel had asked TWC's representative about the failure to respond, the representative had said "that she would 'look into the matter' and 'get back to' the Government." The IRS asked the Board to dismiss the case as a sanction for TWC's desultory approach to the litigation in general and its failure to respond to the written discovery requests within thirty days of delivery in specific. We gave TWC an opportunity to respond to this motion. TWC did not respond.

22. Although TWC had not suggested a reason for denying the motion, we denied the motion nonetheless. In an order issued on October 4, 2002, we noted that our prehearing order provided that written discovery requests which were delivered by October 8 (as the IRS's were) could be answered as late as November 7. The prehearing order implemented Board Rule 117(e), 48 CFR 6101.17(e) (2000), which allows us to prescribe a period of time for response to written discovery requests other than thirty days after service, the deadline specified in Rule 117(a). Because November 7 had not yet occurred, TWC's responses were not yet late. In denying the motion, however, we told the parties that if TWC did not respond to the requests by November 7, the IRS could renew its motion.

23. On November 12, the IRS filed another motion, this one titled "Motion to Dismiss for Failure to Prosecute/Motion for Summary Relief/Motion for Sanctions." In this motion, the IRS set forth as a Statement of Uncontested Fact that TWC has received, but has not responded to, any of the agency's August 16 written discovery requests. The IRS maintains, "Since Appellant has neither objected to nor answered Respondent's Requests for Admission, they should be deemed admitted as a matter of law per Rule 115(g). . . . The Appellant should be forbidden from challenging any points of evidence or fact raised in Respondent's discovery requests, [or] from opposing the Respondent's claims and defenses, and [the Board] should dismiss the Appellant's case and any hearing scheduled herein." The Board authorized TWC to file a response to the IRS's motion. TWC did not respond.

Discussion

> Board Rule 118(b), "Sanctions," provides:
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> When a party or its representative or attorney or any expert/consultant fails to comply with any direction or order issued by the Board (including an order to provide or permit discovery), or engages in misconduct affecting the Board, its process, or its proceedings, the Board may make such orders as are just, including the imposition of appropriate sanctions.

48 CFR 6101.18(b). The sanctions include the following:

> (3) Refusing to allow the disobedient party to support or oppose designated claims or defenses;
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> (4) Prohibiting the disobedient party from introducing in evidence designated documents or items of testimony; [and]
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> . . . .
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> (8) Imposing such other sanctions as the Board deems appropriate.

Id.

This rule is much like Federal Rule of Civil Procedure 37(b). The Supreme Court has explained, "Rule 37(b)(2) contains two standards – one general and one specific – that limit a [trial court or board's] discretion. First, any sanction must be 'just'; second, the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery." Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707 (1982); see generally 2 James Wm. Moore, et al., Moore's Manual Federal Practice & Procedure § 15.13 (1995).

In this case, TWC has consistently made filings either late or not at all, in violation of Board orders. The Board has twice refrained from dismissing the appeal for failure to prosecute, but on each occasion it has cautioned TWC that it will not tolerate further delays in the proceedings. On the second of these occasions, we pointedly told the appellant that if it did not answer the agency's written discovery requests by the date specified in a previous Board order, we would invite a renewal of a motion for sanctions which, if granted, could bring an end to the case. TWC still did not answer the requests. In light of this history, we find that imposing a sanction against TWC would be just.

The written discovery requests are designed to test TWC's grounds, and to learn TWC's evidence, in support of the appellant's claim. Imposing a sanction tailored to those requests, and those subjects, would therefore be specifically related to the particular matter at issue in the order to provide discovery. See Transclean Corp. v. Bridgewood Services, Inc., 290 F.3d 1364, 1373-74 (Fed. Cir. 2002) (this sort of action is an appropriate use of the tribunal's "important power to police its proceedings to ensure transparency and predictability and to discourage mischievous conduct by litigants").

We impose the following sanctions, as authorized by Rule 118(b): The requests for admission are deemed admitted. The appellant may not introduce in evidence any documents which would be responsive to the requests for the production of documents, and the failure to respond to each of those requests is deemed to constitute an admission that no such documents exist. To the extent that the interrogatories request the factual basis for certain assertions by the appellant, the failure to respond is deemed to constitute an admission that there is no such basis.

With the imposition of these sanctions, we are able to make the following conclusions as to uncontested facts, in addition to those listed above in the "Background" section of the opinion:

24. TWC has been compensated for all direct labor hours expended and all material expenses incurred before the effective date of termination of the contract. Requests for Admission 1, 2. TWC has also been compensated for all labor and material expenses reasonably incurred after the effective date of termination. Id. 3.

25. No subcontracts were affected by the termination of the contract. Request for Admission 4.

26. Only $73,332 or less of TWC's direct costs for 1999 are associated solely with this contract. Request for Admission 6. The Settlement by Determination includes payment for general and administrative expenses which consists of this amount multiplied by "the adjusted G&A rate" for TWC. Appeal File, Exhibit 1 at 108. There is no factual basis for any assertion by TWC that it is entitled to more than the amount awarded in the Settlement by Determination for post-termination general and administrative costs. Interrogatory 2.

27. TWC has been compensated for all claimed accounting, legal, clerical, and other expenses reasonably necessary for the preparation of the termination settlement proposal and supporting data. Request for Admission 5.

28. In September 1998, TWC entered into a lease for office space that ran from September 1998 to May 2001, even though the firm's contract had not been extended beyond July 1998. Request for Admission 8. There is no factual basis for any assertion by TWC that entering into a lease that extended well beyond the contractual completion date was reasonable. Interrogatory 5. There is no factual basis for any assertion by TWC that it made reasonable efforts to terminate, assign, settle, or reduce the cost of the lease. Interrogatory 6. The Settlement by Determination includes full payment for lease costs for nine months in 1999. Id. 7; Appeal File, Exhibit 1 at 108. There is no factual basis for any assertion by TWC that it is entitled to more than the amount awarded in the Settlement by Determination for unexpired lease costs. Interrogatory 4.

29. The contracting officer stated in her Settlement by Determination that the pre-termination profit claimed "was previously paid in accordance with the contract terms and conditions on all pre-termination costs." Appeal File, Exhibit 1 at 110. "The figure offered to the contractor [as post-termination profit]," she said, "represents a negotiated bottom line figure consistent with the Contracting Officer's pre-negotiation objectives and TWC's expenditure of all authorized funds under the contract." Id. There is no factual basis for any assertion by TWC that profit determined to be due the firm by the contracting officer was unreasonable. Interrogatory 10.

30. TWC did not object to the following Statement of Uncontested Fact proposed by the IRS in its November 12 motion: "The Appellant is not entitled to any sum of money greater than what the Contracting Officer determined in [her] unilateral settlement determination on 07 May 2001." This statement is consequently uncontested. There is no factual basis for any assertion by TWC that the firm is entitled to any sum of money greater than that determined to be due it by the contracting officer in the Settlement by Determination. Interrogatory 1. TWC has no documents on which to rely and to introduce as evidence in any trial, hearing, or judicial proceeding in this case. Document Production Request 4.

Paragraphs 24 through 29 make clear that there is no basis for granting TWC any money, in addition to that already awarded by the contracting officer in her Settlement by Determination, for most of the elements of the claim. See ¶¶ 4, 6. Paragraph 30 makes clear that there is no basis for granting TWC any money, in addition to that already awarded by the contacting officer in her Settlement by Determination, for the elements of the claim not specifically addressed in Paragraphs 24 through 29. In view of these uncontested facts, we conclude that TWC has received from the Government a fair and complete settlement of each and every one of the categories of costs, fees, and profit claimed in the appellant's termination settlement proposal. We consequently grant the IRS's motion for summary relief.

This disposition of the motion for summary relief resolves all issues raised in TWC's appeal of the contracting officer's decision. We consequently deny the appeal. The IRS's motion to dismiss the case for failure to prosecute is moot.

Decision

The respondent's motion for sanctions is granted. The respondent's motion for summary relief is also granted. The respondent's motion to dismiss for failure to prosecute is dismissed as moot. The appeal is **DENIED**.

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STEPHEN M. DANIELS
Board Judge

We concur:

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ANTHONY S. BORWICK
Board Judge

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CATHERINE B. HYATT
Board Judge