

BORDERING ON THE FRIVOLOUS

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When should the Boards of Contract Appeals dismiss an appeal for failure to prosecute? In *MLU Services, Inc. v. Dept of Homeland Security*, CBCA 8002, March 22, 2024, the Board refused to sanction an appellant for missing a deadline by four days. The Board stated that it viewed the Federal Emergency Management Agency's ("FEMA") motion to dismiss as "bordering on frivolous." Here are the reasons why it so held in denying FEMA's motion.

Before discussing the case, remember that both the Civilian Board ("CBCA") and the Armed Services Board ("ASBCA") have rules that grant each the authority to levy sanctions.

CBCA rule 35(b) states:

If a party or its representative, attorney, expert, or consultant fails to comply with any direction or order of the Board [] 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. []

ASBCA Rule 16 states:

If any party fails to obey an order issued by the Board, the Board may impose such sanctions as it considers necessary to the just and expeditious conduct of the appeal.

In *MLU*, the contractor filed its complaint on Feb. 26, 2024 as directed by the Board, and FEMA filed its answer an addendum on Feb. 29, 2024. *MLU*, pursuant to the Board's initial procedures order, was required to respond to FEMA's addendum within 15 days of the addendum's filing—but *MLU* did not file a response. On March 19, 2024, four days after the missed deadline, FEMA filed a motion to dismiss *MLU*'s appeal that challenged the government's affirmative monetary claim and sought a dismissal for failure to prosecute that portion of the claim.

The Board's response? "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." The Board noted the harshness of using a dismissal for failure to prosecute, stating 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." Also, such a dismissal is appropriate where there is a willful and contemptuous disregard of the Board's rules.

The Board further noted that when an answer is not filed, a board may enter a general denial of the allegations in a complaint or an addendum. And that is precisely what the Board did. It entered a general denial on *MLU*'s behalf of the allegations in the addendum. No dismissal was ordered.

Takeaway. First, it's very important to meet all Board deadlines or request and obtain an extension from the Board. Second, if you violate Board rules or orders, you may be subject to sanctions which may have a serious impact on your case. So meet all deadlines and comply with all Board orders and rules.

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