

CONTRACTOR'S FAILURE TO RESPOND

Copyright Richard D. Lieberman, Consultant & Retired Attorney

A recent decision of the Civilian Board of Contract Appeals ("CBCA") demonstrates the importance of a contractor responding to government motions as provided in the Board Rules. In *Carmazzi Global Solutions, Inc. v. Social Security Administration*, CBCA 6264 et al., the CBCA held that the contractor's failure to respond to the Agency's motion for summary judgment was fatal to its case, and granted the agency's motion.

The Social Security Administration issued task orders to Carmazzi to provide reporters at disability appeal hearings before administrative law judges in three locations. After a transition period, the contractor was required to provide 100% coverage of hearings and provide assurances ahead of each hearing that a reporter would be present. After the transition period, Carmazzi did provide coverage under these task orders, before or after receiving notices of deficiencies, cure notices and show cause notices. Instead of agreeing to cure, the contractor proposed meetings or adjustments and changes to the contract terms. The agency found performance unacceptable and all assurances inadequate, and then terminated for cause each of the three task orders because of contractor default, as provided in the contract. (FAR 52.212-4(m) was a Termination for Cause clause in the contracts that permitted termination for each contract that was in default. During performance, the contractor never offered any reasons for its delays or nonperformance.)

On appeal, the agency filed a motion for summary judgment and a statement of undisputed material facts, consistent with CBCA Rule 8(f) which states:

Summary judgment motions. A party may move for summary judgment on all or part of a claim or defense if the party believes in good faith it is entitled to judgment as a matter of law based on undisputed material facts...

- (1) Statement of undisputed material facts. The movant shall file with its summary judgment motion a separate document titled "Statement of Undisputed Material Facts" [citing exhibits, admissions or other evidence].
- (2) Statement of genuine issues. The opposing party shall file with its opposition a separate document titled "Statement of Genuine Issues" [responding to specific paragraphs in the movants Statement of Undisputed Facts by identifying material facts in genuine dispute and citing exhibits, admissions or other evidence.]

The Agency filed and served a motion for summary judgment and a statement of undisputed material facts supporting the terminations for cause, and including citations to undisputed material facts in the appeal. The contractor filed neither an opposition to the motion nor a statement of any genuine issues of material facts. The Board stated that the contractor's "silence is detrimental to its case, to the extent that the agency has established undisputed facts and legal bases for relief, while the contractor offers no response." Further, the Board noted that the contractor did not seek more time to respond to the motion and was not granted any.

In light of the specific material facts demonstrating default of each task order and the undisputed facts proposed pursuant to the Board rule, the Board refused to speculate as to any possible theories of excusable delay. Indeed, the Board noted that “the contractor has not identified any disputed fact or provided proposed facts and associated legal theories, with record support, that could excuse its non-performance. The record, viewed for purposes of resolving the motion for summary judgment, establishes no excusable delay that could excuse the default, and the agency motion was granted.

Takeaway. Never ignore pleadings from the other side in a litigation, and certainly do not ignore requirements in the rules of any forum or tribunal. Submitting even a weak position is better than no position at all when faced with an opposing motion or a rule that demands a response.

or other helpful suggestions on government contracting, visit:
Richard D. Lieberman’s FAR Consulting & Training at <https://www.richarddlieberman.com/>, and
Mistakes in Government Contracting at <https://richarddlieberman.wixsite.com/mistakes>.