TODD M. HUECKMAN,	)	**AGBCA No. 2000-128-1**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
Todd M. Hueckman	)	
P. O. Box 362	)	
Hines, Oregon 97738	)	
	)	
Representing the Government:	)	
	)	
Elise Foster	)	
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RULING ON FOREST SERVICE MOTION TO DISMISS UNDER BOARD RULE 31

December 22, 2000

Before HOURY, POLLACK, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge POLLACK.

This appeal arises out of Purchase Order (PO) No. 43-0256-8-0625, the 5th Year Stocking Exam, Council Ranger District, Payette National Forest, between the United States Department of Agriculture, Forest Service (FS) Boise National Forest, Boise, Idaho, and Todd Hueckman, Appellant, of Hines, Oregon. The Appellant in bringing the underlying claim in this appeal has asked for additional payment of $1,535.76, Mobilization Costs; $3,600, Down time; and $500, Effects on Scheduling and Bidding. The costs claimed by the Appellant related to work and damages Appellant attributed to the failure of the FS to allow it to perform items set out in Schedule 02 of the PO, which related to the 1999 Stocking Exam.

Appellant and the FS had entered into a PO, awarded in June 1998. The PO set out two items as the Schedule of Items. Item 01 was identified as "Stocking Exam of the Council Ranger District of the Payette National Forest." Item 02 was identified as "FY 1999 Stocking Exam on the Council Ranger District of the Payette National Forest."

Immediately following the listing of Item 01 and Item 02, as identified above, the schedule provided the following:

ITEM 02 WILL BE AWARDED IN FY 99 BASED ON AVAILABILITY OF FUNDS

AVAILABILITY OF FUNDS (52.232-18) (APR 1984)

> Funds are not presently available for this contract. The Government obligation under this contract is contingent upon the availability of appropriated funds from which payment for the contract purposes can be made. No legal liability on the part of the Government for any payment may arise until funds are made available to the Contracting Officer (CO) for this contract and until the Contractor receives notice of such availability, to be confirmed in writing by the CO.

It was undisputed that Appellant completed Item 01 of the PO on or about August 1998. Appellant contended that at the time it left, it believed it would be awarded the Item 02 option, citing in part a statement it attributed to the CO's Representative (COR) that he would see Appellant the next summer. Appellant asserts that he was aware that the FS might not award Item 02, and was prepared for that if he was notified by the CO or COR of a decision not to award. Appellant asserted that from August 1998 to July 1999 he received no notification of the FS intent to exercise Item 02 and in July 1999 reached the COR to notify him that he planned to start work. In that conversation the Appellant said that he and the COR reached agreement to meet at the Council District office to obtain various material needed to proceed with the project. Appellant did proceed to the office and on that date, was notified by the COR that the FS would not be exercising the option. Appellant understood that the basis of the decision was a problem with the wording of the contract. Appellant states that he was also told that he was supposed to have been contacted earlier regarding the decision not to award, but somehow that did not occur. Appellant also indicates that a contract was issued by the FS for the work previously covered under Item 02 and that contract was awarded to another contractor. The decision to not exercise the option apparently had nothing to do with a lack of funding.

By letter of August 30, 1999, the CO responded to Appellant's claim and found no merit in Appellant's contention that it was entitled to costs for the second option year. The CO pointed out that the FS had not notified Appellant in writing that the second option year had been awarded to Appellant and thus, there was no exercise of year two. Nevertheless the CO did recognize entitlement for mobilization costs of $1,535.76, based on her determination that Appellant had operated in good faith and did have conversations with an FS official, albeit not the CO. The CO, however, denied Appellant's claim for costs associated with additional scheduling and Appellant's claim for the down time waiting for the exercise of the year two portion of the contract. In particular the CO reiterated that the Appellant had not contacted her as to whether the FS intended to exercise the second option year, had not received a purchase order for the work, and had not received a Notice to Proceed.

The Appellant wrote to the CO on November 8, 1999, and essentially reiterated its position. On January 4, 2000, the CO denied the claim based on operation of the clause titled Termination for Convenience of the Government, FAR 52.249-4. The CO stated that under the clause, "the Government shall be liable only for payment under the payment provisions of this contract for services rendered."

The Appellant filed a timely appeal of the CO's decision. By letter of January 28, 2000, the Board docketed the appeal and directed Appellant to file a Complaint. Appellant filed its Complaint dated March 6, 2000. The FS filed a timely Answer and provided an Appeal File.

By letter of April 20, 2000, the Board directed the parties to advise the Board within 60 days as to whether the parties wanted to proceed with a hearing or on the record.

The Board was advised by letter from the FS dated May 11, 2000, that the FS wished to proceed under Board Rule 11, submission without a hearing. Appellant submitted no response.

On July 6, 2000, the FS filed a Motion to Dismiss Under Board Rule 31. Board Rule 31 deals with dismissals on the basis of failure to prosecute. The FS requested that the Board order the Appellant to show cause why the appeal should not be dismissed for lack of prosecution.

On July 14, 2000, the Board wrote to the Appellant. Appellant was afforded 30 days from receipt of the Motion from the Board to provide a response. The Board's letter was sent by certified mail and received and signed for on July 24, 2000 by Susan Hueckman.

The Board received no response to the above letter. Consequently, the Board sua sponte sent an Order to Show Cause to Appellant. The Order was dated October 4, 2000 and received by Appellant on October 11, 2000. It was signed for, as was the earlier letter, by Susan Hueckman. The Board recited that the Motion had been filed by the FS and that a copy of the Motion was served on Appellant. The Order also recited that the postal receipt showed that Appellant had received the earlier Board letter and the FS Motion. The Board then stated in its Order to Show Cause that Appellant had 14 days to show cause why the appeal should not be dismissed for failure to prosecute.

The Board has received no response from the Appellant to the Board's Order to Show Cause.

RULING

Appellant has twice been provided and twice received directions to respond to the FS Motion to Dismiss. The last opportunity was set forth in the Board's Order to Show Cause of October 4, 2000. Appellant has not responded. Accordingly, Appellant's appeal is dismissed with prejudice for failure to prosecute.

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HOWARD A. POLLACK
Administrative Judge

Concurring:

_____
EDWARD HOURY
Administrative Judge

_____
ANNE W. WESTBROOK
Administrative Judge

Issued at Washington, D. C.
December 22, 2000