

REDSTONE GRAIN COMPANY,

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AGBCA No. 2002-134-1

Appellant

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Representing the Appellant:

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Representing the Government:

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DECISION OF THE BOARD OF CONTRACT APPEALS

June 3, 2003

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge POLLACK.

This appeal arises out of a final decision involving the Uniform Grain and Rice Storage Agreement (UGRSA), No. A30-3-CCC-0731, with Redstone Grain Company (RGC), warehouse code 2-2475, Redstone, Montana, and Commodity Credit Corporation (CCC), U. S. Department of Agriculture. The agreement was terminated by CCC by decision of the Contracting Officer (CO), dated April 16, 2002. Appellant filed a timely appeal dated May 9, 2002.

The position of CCC was that Appellant had been removed from the CCC List of Approved Warehouses on August 7, 2001. That removal was due to conditions noted during an examination conducted March 28, 2001, which adversely affected the interests of CCC. On February 19, 2002, the CO proposed terminating Appellant's storage contract. RGC requested a review of the proposed termination by the Deputy Administrator, Commodity Operations (DACO). The Deputy Administrator responded to RGC on March 20, 2002, outlining the issues

to be addressed and setting a date of April 12, 2002 for RGC to respond. As of the date of the termination, April 16, 2002, CCC had not received a response from RGC.

The CO then noted that since terms and conditions of RGC's storage agreement had not been fulfilled, RGC was subject to termination as set out in Section 9(a)(1) of the Supplement to the Storage Agreements. The CO then exercised the termination. The CO provided Appellant with a statement of appeal rights which told Appellant that it could appeal under the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613) and that it could pursue that appeal at either the Board or at the U.S. Court of Federal Claims.

In Appellant's timely appeal of May 9, 2002, Appellant stated that it believed RGC had complied with the terms and conditions of its storage agreement. It stated that conditions noted during the March 28, 2001, examination were corrected soon thereafter and CCC in Kansas City was notified of the corrections. RGC also took the position that all issues in the Deputy's letter, to which it was to respond by April 12, had been discussed in a letter written by RGC on March 7, 2002, and addressed to the Deputy Administrator for review in Washington, D.C. A copy of that letter was enclosed with Appellant's appeal.

On August 23, 2002, CCC through its counsel, filed a Motion to Dismiss. The basis of the Motion was the contention by CCC that the Board lacked subject matter jurisdiction in this appeal. CCC stated that the Board's jurisdiction is limited to those subjects described in 7 CFR § 24.4, namely contracts for procurement of property, services, construction and disposal of personal property, as well as crop insurance and debarment matters. According to the motion, the Board's jurisdiction does not extend to the termination of a Uniform Grain Storage Agreement, as such appeals are made pursuant to the regulations found in 7 CFR Part 780. CCC, therefore, asked that the appeal be dismissed with prejudice. A copy was furnished to Appellant. CCC also pointed out that Appellant received notice of docketing on July 8, 2002, as evidenced by the green certified receipt card, and that as of the date of the motion, RGC was late as to filing its Complaint.

The Board wrote to the Appellant giving it an opportunity to respond to the Government's motion. The letter from the Board did not make a response mandatory.

As of November 7, 2002, the Board had still not received a Complaint from Appellant. It appeared that Appellant might indeed be abandoning the appeal. Therefore, on November 7, 2002, the Board issued an Order to Show Cause. The Board noted that it had given Appellant an opportunity to respond to the motion but had received no response. The Board then stated that while not deciding the issue as to jurisdiction in the Order to Show Cause, the Board has in the past exercised jurisdiction over disputes concerning Uniform Grain and Storage Agreements, citing Farmers Grain Co., AGBCA Nos. 88-192-1, 88-250-1, 92-3 BCA ¶ 25,072. The Board noted that it was prepared to render a decision on jurisdiction, however, would not do so if it was Appellant's intention not to actively pursue the appeal. The Board noted that should Appellant not respond to Board directions as to information, the Board would conclude that Appellant no longer wished to pursue the appeal and would rule accordingly. Appellant was advised that it had 15 days to notify the Board as to whether it intended to pursue the appeal. Appellant was advised that if it so notified the Board, the Board would decide the issue of jurisdiction. The

Appellant was told also that if it did not contact the Board within the time set in the Order, the Board would dismiss the appeal for failure to prosecute.

The Appellant did not respond to the Order to Show Cause dated November 7, 2002.

DISCUSSION

Appellant has failed to respond to a Board Order to Show Cause which advised Appellant that absent a contrary response from Appellant, the Board would dismiss the appeal for failure to prosecute. Accordingly, there is a valid basis for dismissal.

DECISION

Appellant has failed to prosecute the appeal. The appeal, therefore, is dismissed under Board Rule 31 for failure to prosecute. There is no need to address the issue of Board jurisdiction over Uniform Grain Storage Agreements.

HOWARD A. POLLACK
Administrative Judge

Concurring:

JOSEPH A. VERGILIO
Administrative Judge

ANNE W. WESTBROOK
Administrative Judge

Issued at Washington, D.C.
June 3, 2003