

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 March 2013

Case No.: 2012-DBA-00001

In the Matter of

Proposed debarment of labor standards violations by:

**KEY WINDOW SYSTEMS, LLC and
DON KEYLON, President
(Second Tier Subcontractor)**
Respondents

With respect to laborers and mechanics employed by the
Second-Tier Subcontractor on Contract

Contract No. 20090716
(Jobsite: Bedell Terrace Apartments,
Hempstead, New York)

**ORDER DISMISSING APPEAL,
BASED ON RESPONDENT'S FAILURE TO ADHERE TO ORDERS**

This matter is subject to the implementing regulations of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5 (Feb. 17, 2009), found at Title 29, Code of Federal Regulations, Part 5. The governing procedural regulation is at 29 C.F.R. Part 18. The Complainant is not represented by counsel. A hearing in this matter is presently scheduled to convene on March 21, 2013, in New York City.

Procedural History

On January 11, 2011, the Regional Administrator, Wage and Hour Division, U.S. Department of Labor, issued determination letters against the Respondents, Key Window Systems, LLC, and its president, Don Keylon. In the determination letters, the Regional Administrator informed the Respondents of the results of an investigation that determined that the Respondents had violated regulatory requirements as follows: failed to pay prevailing wages; failed to pay for all hours worked; failed to pay fringe benefits; committed falsified statements of compliance; submitted falsified pay records; failed to keep accurate records on employee hours worked. The Regional Administrator determined that the Respondents owed a total of \$77,678.60 in back wages to 16 employees. Further, the Regional Administrator determined that the violations were aggravated or willful and, therefore, the Respondents should be placed on the listing of ineligible bidders for a period of three years, as authorized under 29

C.F.R. § 5.12(a)(1). Additionally, the Regional Administrator provided the Respondents with an opportunity to request a hearing as to the matters contained in the determination letter, and informed the Respondents that their failure to timely request a hearing would result in their placement on the ineligible bidders list as set forth in the determination letter.

On February 9, 2011, through counsel, the Respondents timely requested a hearing. On October 12, 2011, the Regional Administrator submitted an Order of Reference to the Chief Administrative Law Judge. On November 3, 2011, the Chief Administrative Law Judge issued a Pre-Hearing Order, to which the Administrator's representative and the Respondents submitted responses. Thereafter, this matter was assigned to Administrative Law Judge (ALJ) Ralph A. Romano, who on April 17, 2012 issued an order setting this matter for hearing on August 21, 2012. Later, on May 1, 2012, ALJ Romano cancelled the hearing at the parties' request, as settlement discussions were ongoing.

In November 2012, ALJ Romano retired, and this matter was transferred to me. On November 27, 2012, I directed the parties to confer and submit a joint status report regarding their progress toward settlement. Shortly thereafter, counsel for the Respondents submitted a Motion to Withdraw. In the Motion, counsel indicated that the Respondents had failed to maintain communication, thus rendering effective representation impossible. On January 8, 2013, I granted counsel's motion, and on January 10, 2013 I issued an Order in which I set a new date for the hearing, March 21, 2013. In that order I set out multiple requirements for the parties, and I specifically directed the Respondents to inform me of their receipt of the Order, and provide a copy of their acknowledgments to the Administrator's representative. Order at 2. My Order was sent to the Respondents by overnight delivery service; the tracking reports indicate successful delivery to both Respondents.

On February 7, 2013, counsel for the Deputy Acting Administrator (hereinafter, "Administrator") filed a "Motion for Default Judgment" against the Respondents. In the Motion, the Administrator asserted a default judgment was appropriate in this matter because the Respondents failed to comply with my Order dated January 10, 2013, requiring them to acknowledge receipt of my Order in writing and provide copies of their written acknowledgments to the Administrator's counsel. Memorandum of Law in Support of Motion for Default Judgment at 3-4; see also Order of Jan. 10, 2013, at 2.

By Order dated February 14, 2013, I ordered the Respondents to file a response to the Administrator's counsel's Motion for Default Judgment, not later than February 24, 2013, and I listed the issues that the Respondents were required to address in their response. Among other things, I informed the Respondents that I would construe their failure to submit a complete response as a failure to comply with my Orders, and on such basis would consider whether to issue a default judgment in favor of the Administrator. See 29 C.F.R. § 18.6(d)(2). This Order was transmitted to the Respondents via overnight delivery service.

The Respondents did not submit any response to the Order of February 14, 2013. The tracking reports (attached) indicate the Order was successfully delivered to the Respondents. Because the Respondents failed to submit a response, on March 4, 2013, I issued an "Order to Show Cause Why I Should Not Grant Administrator's Motion for Default Judgment." In that

order, I ordered the parties to show cause why I should not grant the Administrator's counsel's motion for default judgment, based on the Respondents' failure to adhere to my orders, and I ordered the parties' submissions to be filed so that I received them not later than March 11, 2013. The Order was transmitted to the Respondents via overnight delivery service.

On March 8, 2013, the Administrator's counsel timely submitted a response, in which the Administrator reiterated the position that I should grant the Administrator's earlier Motion for Default Judgment. I did not receive any response from the Respondents to my Order, and the time for filing a response has passed. Additionally, the tracking reports (attached) indicate the order was successfully delivered to the Respondents.

Discussion

The governing procedural regulation, at 29 C.F.R. § 18.6(d)(2), permits an administrative law judge to take appropriate action when a party has failed to comply with a subpoena or order. Such action includes, but is not limited to, a ruling that a decision be rendered against a non-complying party. 29 C.F.R. § 18.6(d)(2)(v).

I have repeatedly informed the Respondents that their failure to adhere to my orders may result in sanctions. Order of Jan. 10, 2013 at 3; order of Feb. 14, 2013 at 3; order of Mar. 4, 2013 at 2. Additionally, I have specifically informed the Respondents that I would construe their failure to respond to me, as directed in my orders, as a failure to comply with my Order, and on that basis would consider whether to issue a default judgment in favor of the Administrator.

In sum, despite multiple orders, the Respondents have failed or refused to communicate with me about their upcoming hearing. Moreover, my orders specifically informed the Respondents of the consequence of a failure to respond.¹

In the event a party fails to adhere to an order of an administrative law judge, the governing regulation authorizes the administrative law judge to "take such action in regard thereto as is just." 29 C.F.R. § 18.6(d)(2). Such action against a non-complying party can include taking adverse inferences; imposing restrictions on the use of discovery or submissions of evidence; striking pleadings. 29 C.F.R. § 18.6(d)(2)(i)-(iv). Additionally, in such circumstance an administrative law judge is authorized to enter a decision against a non-complying party. 29 C.F.R. § 18.6(d)(2)(v).

Based on the record, I find that the Respondents have failed to adhere to any of the orders I have issued in this matter. I further find that the notice to the Respondents has been adequate and is established, in accordance with 29 C.F.R. § 18.3(d) (leaving copies at the principal place of business or residence).

¹ I am mindful that the Respondents are not represented by counsel. However, to date the only requirements I have imposed on the Respondents are that they respond to me to acknowledge receipt of my orders and inform me whether they intend to respond to the Administrator's requests for discovery. See, e.g., Order of Feb. 14, 2013, at 2-3.

Notably, the hearing is a matter which the Respondents themselves requested, through their then-counsel, in February 2011. Respondents have since failed to communicate with counsel, precipitating counsel's motion to withdraw from representation. The multiple orders to which the Respondents failed to respond pertained to the upcoming hearing. Their conduct justifies action under 29 C.F.R. § 18.6(d). I also find, based on the Respondents' actions, that they have abandoned their appeal in this matter. Accordingly, dismissal is warranted under 29 C.F.R. § 18.29(a).

In light of the foregoing, as authorized by 29 C.F.R. § 18.6(d)(2)(v) and § 18.29(a), I DISMISS the Respondents' appeal.

This matter is DISMISSED.

SO ORDERED.

Adele H. Odegard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within forty (40) days of the date of issuance of the administrative law judge's decision. *See* 29 C.F.R. § 6.34. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. The Petition must refer to the specific findings of fact, conclusions of law, or order at issue. *See* 29 C.F.R. § 6.34. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

When a Petition is timely filed with the Board, the administrative law judge's decision is inoperative until the Board either (1) declines to review the administrative law judge's decision, or (2) issues an order affirming the decision. *See* 29 C.F.R. § 6.33(b)(1).

At the time you file the Petition with the Board, you must serve it on the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. *See* 29 C.F.R. § 6.34.