

NITRO ELECTRICAL CORP.**CONTRACT NO. V632C-818****VABCA-3777R****VA MEDICAL CENTER
NORTHPORT, NEW YORK**

Frank Shannon, President, Nitro Electrical Corp., Lindenhurst, New Jersey, for the Appellant.

Charlma J. Quarles, Esq., Deputy Assistant General Counsel; and *Phillipa L. Anderson, Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

**OPINION BY ADMINISTRATIVE JUDGE KREMPASKY
BACKGROUND**

On October 27, 1998, the Board docketed, as VABCA-3777R, for the purposes of considering Appellant's, Nitro Electrical Corporation (NEC), request that the Board "[m]odify or amend the[ir] decision to show that Nitro did in fact pay the[ir] suppliers." The Board issued its decision denying NEC's appeal of the Department of Veterans Affairs (VA or Government) termination of Contract No. V632C-818 (Contract) for default on February 3, 1995. *Nitro Electrical Corp.*, VABCA-3777, 95-1 BCA ¶ 27,492. On May 3, 1995, the Board denied NEC's timely Motion For Reconsideration of that decision. *Nitro Electrical Corp.*, VABCA-3777R, 95-2 BCA ¶ 27,672. Familiarity with those decisions is presumed.

DISCUSSION

The Board's Rules provide for filing a Motion For Reconsideration within thirty days from the date a party receives the Board's decision. NEC availed itself of that opportunity and we denied the Motion. Our Rules do not explicitly provide for the filing of a second Motion For Reconsideration which, in any event, would be untimely by over three years. However, we retain the discretion to amend our decisions as part of our intrinsic power as an adjudicative body. We will exercise this power in extraordinary circumstances in order to correct substantial injustice and in exercising this power we will look to *Federal Rule of Civil Procedure (FRCP) 60* for "appropriate guidance." *SEI Information Technology*, VABCA No. 1748, 83-1 BCA ¶ 16,223 at 80,608; *Mac-In-Erny, Inc.*, ASBCA No. 28,689, 88-1 BCA ¶ 20,359; *Modoc Foresters, Inc.*, AGBCA No. 96-130-1; 96-1 BCA ¶ 28,174.

FRCP 60, "**Relief from Judgment or Order**," in part, states as follows:

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable

neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

We will treat NEC's instant request as a Motion For Relief From Judgment under *FRCP 60(b)(6)*. In the case-in-chief, the Board upheld the VA's default termination of NEC's contract and found that the primary reason for NEC's failure to complete its contract was due to NEC's inability to obtain the necessary supplies and technical assistance from its subcontractors. The Board found that this inability to obtain the supplies and technical assistance was primarily the result of the incompetence of the subcontractors and NEC's failure to adhere to subcontract payment terms. NEC has specifically requested the Board to modify the portion of the decision wherein the Board concluded that NEC's problems with its equipment suppliers that directly led to its default on the Contract stemmed, in part, from NEC's subcontractor payment practices.

In support of its request, NEC has submitted several documents from the record, including decisions of the Court, in a civil action between NEC and one of its suppliers in the New York Supreme Court for the County of Suffolk. NEC urges us to conclude from the documents submitted that NEC had, in fact, properly paid one of its suppliers, a conclusion stemming from the Court's granting of the suppliers' request for dismissal of its action for unpaid balances because the balance had been paid by NEC's surety in a parallel action in Federal District Court.

FRCP 60(b) provides for a *(b)(6)* Motion For Relief From Judgment to be made within a "reasonable" time after a judgment is entered. We conclude that this Motion, filed well over three years after the Board's decision was final, was not made in reasonable time and that it is untimely.

We also note that, even if we considered it, the Motion fails to present the extraordinary circumstances warranting the exercise of our inherent power to amend a previous, final judgment of the Board.

Finally, NEC, in its Motion, continues its pattern of unsubstantiated, vituperative attacks on both the fairness of the proceedings before the Board and various individuals in the VA, issues that the Board previously addressed in the decision-in-chief and the decision on the Motion For Reconsideration. We see no reason to further consider these baseless, conclusory allegations.

DECISION

For the foregoing reasons, the Motion For Relief From Judgment of Appellant, Nitro Electrical Company to amend the Board's decision in *Nitro Electrical Corp.*, VABCA-3777, 95-1 BCA ¶ 27,492 is **Dismissed**.

Date: January 6, 1999

Richard W. Krempasky
Administrative Judge
Panel Chairman

We Concur:

Guy H. McMichael III
Chief Administrative Judge

Morris Pullara, Jr.
Administrative Judge