

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Centron Industries, Inc. ) ASBCA No. 52581  
 )  
Under Contract No. N00104-96-C-NA30 )

APPEARANCE FOR THE APPELLANT: Sam Zalman Gdanski, Esq.  
Suffern, NY

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.  
Navy Chief Trial Attorney  
Stephen A. Elliott, Esq.  
Assistant Counsel  
Naval Inventory Control Point  
Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

This appeal was taken from a contracting officer's decision terminating the contract for default. Centron's complaint also requested a price adjustment. No price adjustment claim, however, had been submitted to the contracting officer. With the parties concurring, we confirmed by order dated 3 April 2000 that only the default termination was before us. On 28 September 2001, four days after the scheduled close of discovery, the contracting officer converted the default termination to a convenience termination. On 21 November 2001, we ordered the parties to show cause why the appeal should not be dismissed. In response, Centron requested in effect that the appeal be sustained. The Government moved to dismiss for lack of jurisdiction on the ground that the appeal was "moot." We deny the motion to dismiss and sustain the appeal.

The Government and the dissent argue that this appeal must be dismissed because (i) if sustained, Centron would be a prevailing party under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, and (ii) that result would be inconsistent with *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001) and *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371 (Fed. Cir. 2002). This argument puts the EAJA cart before the case disposition horse. *Buckhannon* and *Brickwood* involved fee applications submitted after final dispositions of the underlying dispute. Centron's appeal involves the proper disposition of the underlying dispute, not a post-disposition fee application. *Brickwood* interpreting *Buckhannon* tells us that if we dismiss the appeal, Centron will not be a prevailing party eligible for an EAJA award. *Buckhannon* and *Brickwood* do not tell us whether to dismiss

or sustain the appeal. Thus, contrary to the Government and the dissent, *Buckhannon* and *Brickwood* do not apply at this stage of the dispute.

The Government motion to dismiss goes to our jurisdiction. To decide that motion, we look to our own jurisdictional precedents which *Buckhannon* and *Brickwood* do not purport to address. Those precedents are (i) that once an appeal has been filed, the Government cannot divest us of jurisdiction by withdrawing the appealed decision, *Falcon Research & Development Co.*, ASBCA No. 26853, 87-1 BCA ¶ 19,458 at 98,335, *aff'd Falcon Research & Development Company v. United States*, 831 F.2d 1056 (Fed. Cir. 1987) (“affirmed on the basis of the Board’s opinion”); *Triad Microsystems, Inc.*, by *Charles W. Duff, Trustee in Bankruptcy*, ASBCA No. 48763, 96-1 BCA ¶ 28,078 at 140,196; *Holmes & Narver, Inc.*, ASBCA No. 51430, 99-1 BCA ¶ 30,131 at 149,055; and (ii) that specifically in the case of withdrawn default terminations, the appeal will be sustained if requested by appellant, with or without the consent of the Government. *Telimed Heath Systems, Inc.*, ASBCA No. 42886, 92-1 BCA ¶ 24,401 at 121,827; *Information Systems and Network Corp.*, ASBCA No. 41514, 92-3 BCA ¶ 25,049 at 124,849; *Electronic Systems & Equipment, Inc.*, ASBCA No. 44056, 97-2 BCA ¶ 29,198 at 145,289.

We have similarly sustained at the request of appellants, and without the consent of the Government, appeals on withdrawn Government monetary claims. *Texas Instruments, Inc.*, ASBCA No. 29049, 87-3 BCA ¶ 19,998; *Texas Instruments, Inc.*, ASBCA Nos. 32725, 33221, 89-2 BCA ¶ 21,785, *Texas Instruments, Inc.*, ASBCA No. 32925, 89-2 BCA ¶ 21,787; *Texas Instruments, Inc.*, ASBCA Nos. 28918, 33898, 89-3 BCA ¶ 21,934; *Texas Instruments, Inc.*, ASBCA No. 32154, 90-1 BCA ¶ 22,258; *Texas Instruments, Inc.*, ASBCA Nos. 35992, *et al.*, 90-1 BCA ¶ 22,259; *Texas Instruments, Inc.*, ASBCA Nos. 35994, 35995, 90-1 BCA ¶ 22,260; *McDonnell Douglas Astronautics Company*, ASBCA No. 36770, 89-3 BCA ¶ 22,253; *Grumman Aerospace Corporation*, ASBCA Nos. 35941, *et al.*, 90-3 BCA ¶ 23,205; *Inter-Continental Equipment, Inc.*, ASBCA Nos. 43298, *et al.*, 94-3 BCA ¶ 27,179; *D.E.W., Incorporated and Trinity Universal Insurance Co.*, ASBCA Nos. 46075, 46285, 95-2 BCA ¶ 27,711.

The Government cites decisions of the Postal Service and Department of Agriculture Boards of Contract Appeals stating that dismissal is proper when an appealed default termination is withdrawn because the appeal is “moot.” See *Calvin Harris dba Harris Electric, Linda Harris dba C & L Electric*, PSBCA Nos. 3392, *et al.*, 94-1 BCA ¶ 26,503; *H.H. Christian Company*, AGBCA No. 82-120-1, 83-1 BCA ¶ 16,335. To the extent these decisions of other boards hold that a withdrawal of the default termination removes our jurisdiction to sustain on the merits, they are contrary to our own precedents, and provide no persuasive reason for departure therefrom.

Centron’s request that the appeal be sustained is in substance a motion for summary judgment on the merits. See *Grumman Aerospace Corporation, supra*. In a default

termination appeal, the Government has the burden of proving the default. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987) Having converted the default termination to one for convenience while the appeal was pending, the Government has failed to carry its burden of proof in the appeal. There are no genuine issues of material fact and, under our precedents cited above, Centron is entitled to a Board decision sustaining the appeal as a matter of law.

The motion to dismiss is denied. The appeal is sustained.

Dated: 1 October 2002

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MONROE E. FREEMAN, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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ROBERT T. PEACOCK  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I dissent  
(See separate opinion)

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ALEXANDER YOUNGER  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I dissent  
(See separate opinion)

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

DISSENTING OPINION BY ADMINISTRATIVE JUDGES  
THOMAS AND STEMLER

We dissent from the majority's opinion. We start with a more complete statement of the factual and procedural background to the decision and then turn to the issues.

On 21 December 1995, the Navy awarded Centron Contract No. N00104-96-C-NA30 for multicoupler assemblies. The contract included FAR 52.249-1 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (SHORT FORM) (APR 1984) and FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984). The Default clause provides that “[i]f, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government” (FAR 52.249-8(g)). (R4, tab 1)

On 13 December 1999, the contracting officer issued Modification No. P00007 terminating the contract for default. Appellant contended that any default was excusable because of defective specifications. (R4, tabs 8, 48, 50)

On 18 January 2000, the Board docketed appellant's timely appeal of the termination for default as ASBCA No. 52581. In its complaint, appellant requested that the Board sustain the appeal, rule that the termination for default be converted to one for convenience, equitably adjust the contract in the amount of \$115,008, and grant it termination for convenience settlement costs. On 3 April 2000, following a telephone conference with the Board addressing whether the Board had jurisdiction of the request for an equitable adjustment in the absence of a claim, appellant explained that “[t]he amount of \$115,008 will be included as part of appellant's termination for convenience settlement proposal in the expected event that the Board converts the termination for default of subject contract into a termination for the convenience of the government.” On the same date, the Board issued an order confirming that only the propriety of the default termination was before it. (Corres. file)

On 28 September 2001, following the scheduled completion of discovery and prior to the hearing, the contracting officer issued Modification No. P00008 rescinding Modification No. P00007 and terminating the contract for convenience. The modification provided instructions for settling termination costs under the contract. On 17 October 2001, the Government provided a copy of Modification No. P00008 to the Board. (Corres. file)

On 21 November 2001, the Board issued an order asking the parties to show cause “why the appeal should not be dismissed as moot on the default termination issue.” On 23 December 2001, appellant timely replied:

Appellant will submit an affirmative monetary claim as Termination for Convenience costs. In terms of closing out the pending [appeal] procedurally, we would like to schedule an appropriate official document to be issued by the [Board] so appellant may seek reimbursement of attorney's fees, since it believes the government's conversion of the Termination for Default to a Termination for Convenience, in effect, is granting the relief requested, which sought the very relief granted, and therefore, we will seek attorney's fees under EAJA [the Equal Access to Justice Act, 5 U.S.C. § 504].

On 22 January 2002, the Government moved to dismiss the appeal for lack of jurisdiction. The Government argued that the conversion of the termination for default to one for convenience left no issue ripe for decision. The Government acknowledged that in cases such as *Electronic Systems & Equipment, Inc.*, ASBCA No. 44056, 97-2 BCA ¶ 29,198, the Board sustained appeals under these circumstances on the rationale that the conversion “grants the appellant all the relief that could have been obtained after a full hearing and decision on the merits” (97-2 BCA at 145,290). The Government argued that these cases were in conflict with *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 121 S. Ct. 1835 (2001). The Government asserted that “the Board decisions have sustained appeals if the appellant could have won on the merits, while *Buckhannon* holds that a prevailing party must have won on the merits” (mot. at 4).

In its response, appellant argued *inter alia* that the Government was incorrect in concluding “that a prevailing party ‘must have won’ on the merits.” Rather “[t]he Court in *Buckhannon* specifically noted that ‘in addition to judgments on the merits, we have held that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney’s fees.’” Appellant stated that “[w]hat this will mean is that henceforth all the settlement agreements will specifically have to have the Board’s imprimatur.” (App. resp. at 2) Appellant concluded:

A proper decision by the government to then settle a matter [after litigation] which does not provide the reimbursement of attorney’s fees severely would restrict the understanding and reading of EAJA.

Again, *Buckhannon* itself specifically states and PDI [*Poly Design, Inc.*, ASBCA Nos. 48591 *et al.*, 01-2 BCA ¶ 31,644] held that an appellant can still obtain EAJA relief by a consent adoption of a settlement proposal if appellant timely requests the same.

*Buckhannon Board and Home Care v. West Virginia Department of Health and Human Resources*, 121 S.Ct. 1835, 1838 (2001).

(App. resp. at 3)

### DISCUSSION

In *Buckhannon*, the Supreme Court stated that “enforceable judgments on the merits and court-ordered consent decrees create the ‘material alteration of the legal relationship of the parties’ necessary to permit an award of attorney’s fees.” 121 S. Ct. at 1840, quoting *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 792-93 (1989). The Court rejected the catalyst theory, which “allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.*

The Court dealt explicitly with the problem of cases which may become moot prior to a judicially sanctioned change in the legal relationship of the parties. Petitioners asserted as one of their arguments “that the ‘catalyst theory’ is necessary to prevent defendants from unilaterally mooting an action before judgment in an effort to avoid an award of attorney’s fees.” The Court was “skeptical” of this assertion, stating, *inter alia*:

And petitioners’ fear of mischievous defendants only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant’s change in conduct will not moot the case. Even then, it is not clear how often courts will find a case mooted: “It is well settled that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice” unless it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (internal quotation marks and citations omitted).

*Id.* at 1842-43, footnote omitted.

In *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371, 1380 (Fed. Cir. 2002), quoting *Buckhannon*, the Federal Circuit stated that in order for a plaintiff to be a prevailing party under *Buckhannon*, there must be a “‘court-ordered change in the legal relationship’ of the parties.” The Federal Circuit held that the Court’s ruling applied to cases in which a defendant’s voluntary change in conduct resulted from the litigation itself as well as from legislation.

In Board proceedings, a decision sustaining an appeal is the equivalent of an enforceable judgment on the merits. Such a decision results in a Board-ordered change in the legal relationship of the parties. That is why in our consent judgments, we sustain the appeal. *See Elrich Contracting, Inc.*, ASBCA No. 50867, 02-2 BCA ¶ \_\_\_\_, slip op. at 5 (Aug. 7, 2002) (discussion of Board procedures).

Here appellant sought conversion of the termination for default to one for convenience. The Board's jurisdiction was limited to the merits of the default termination. Appellant had not submitted a claim for monetary relief. The Government converted the termination for default to one for convenience following the close of discovery. Consequently, appellant obtained all the relief it sought without the aid of a Board-ordered change in the legal relationship of the parties.

Sustaining the appeal under these circumstances, and thus qualifying the appellant as a prevailing party for purposes of EAJA, is inconsistent with *Buckhannon*. We cannot sustain the appeal as if we decided the issues presented by the appeal because we made no such decision. Furthermore, we do not have before us the situation of a consent judgment, as referred to by appellant in its arguments, because the Government has not consented to the Board's sustaining the appeal in the nature of a consent judgment.

The Supreme Court recognized in *Buckhannon* that the effect of its decision would be the denial of attorney's fees in cases (such as *Buckhannon* itself) which became moot prior to judicial action. The Court observed that a case could only become moot where it was "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." This is such a case. There is no reasonable basis for an expectation that the Government could attempt to terminate the contract for default in the future.

The majority responds that "*Buckhannon* and *Brickwood* involved fee applications submitted after final dispositions of the underlying dispute. Centron's appeal involves the proper disposition of the underlying dispute, not a post-disposition fee application." There is no question as to the proper disposition of the underlying dispute; the Government agrees that the termination for default should be converted to one for convenience and has done so. All that remains for consideration is whether appellant may qualify, through this decision, as a prevailing party for purposes of EAJA. The majority continues that "*Brickwood* interpreting *Buckhannon* tells us that if we dismiss the appeal, Centron will not be a prevailing party eligible for an EAJA award. *Buckhannon* and *Brickwood* do not tell us whether to dismiss or sustain the appeal." We agree that if we dismiss the appeal, appellant will not be a prevailing party eligible for an EAJA award. If, on the other hand, we sustain the appeal, appellant will be a prevailing party. That being the case, we believe it is incumbent upon us to look at *Buckhannon* and *Brickwood* for guidance on the appropriate disposition of the appeal.

The majority relies upon various precedents. They are inapposite. In *Falcon, e.g.*, the contracting officer issued two decisions. The first denied appellant's claim as a whole but allowed it in the amount of \$257,358. The second purported to withdraw the first and deny the claim in all respects. The withdrawal of the first decision did not moot the dispute between the parties but rather exacerbated it. (87-1 BCA at 98,334-35) Here, no dispute remains (other than as to attorney's fees). In *Triad*, the contracting officer withdrew his decision under the misapprehension that he was not authorized to issue it because of litigation at the Court of Federal Claims. Again, the withdrawal did not moot the dispute between the parties. (96-1 BCA at 140,195) The *Texas Instruments* line of cases involved a threat of recurring conduct (*see, e.g.*, ASBCA No. 26714, 89-1 BCA ¶ 21,253 at 107,161; ASBCA Nos. 32725, 33221, 89-2 BCA ¶ 21,785 at 109,614). Here there is no credible threat that the Government will attempt to rescind the termination for convenience. Most importantly, none of the cited precedents, including termination cases such as *Electronic Systems & Equipment, Inc.*, addressed the issue before us in this appeal in the context of *Buckhannon*.

The importance of this issue is not lost upon appellant. When the author of the majority's opinion *sua sponte* ordered it to show cause why the appeal should not be dismissed as moot, it replied that it desired another disposition in order to establish its eligibility for EAJA fees. In essence, the majority does not agree with the blow dealt to the catalyst theory by the Supreme Court in *Buckhannon* and attempts by this opinion to circumvent it.

There seems to be no dispute that the appeal is moot. Accordingly, we would grant the Government's motion and dismiss the appeal.

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 52581, Appeal of Centron Industries, Inc., rendered in conformance with the Board's Charter.

Dated:

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EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals