

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
The Ryan Company) ASBCA No. 48151
)
Under Contract No. F33601-93-C-W087)

APPEARANCE FOR THE APPELLANT: Leo S. McNamara, Esq.
McNamara & Flynn, P.A.
Boston, MA

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Diana S. Dickinson, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE ELMORE
ON RESPONDENT'S MOTION FOR RECONSIDERATION

The Government has filed a timely motion requesting the Board reconsider that portion of its decision, rendered in *The Ryan Company*, ASBCA No. 48151, 2000 ASBCA Lexis 153 (Aug. 15, 2000), denying the Government's argument the termination should be upheld because appellant certified in its Representations and Certifications it had not been terminated for default in the three years prior to the award of Contract No. F33601-93-C-W087 (C-W087), the contract in dispute. Appellant has filed a brief in opposition to the Government's motion. Familiarity with the Board's decision is presumed.

In its original decision the Board took judicial notice that on 29 March 1991, within the three year time period prior to the award of contract C-W087, Ryan's Contract No. N62470-83-C-3012 was partially terminated for default. However, the Board held that the Government neither presented direct testimony on the issue of Ryan's alleged misrepresentation nor made the Representations and Certifications, which the Government claimed were executed by Ryan, a part of the record.

For the most part the Government's reconsideration motion repeats the same arguments previously considered and rejected by the Board. Although the Board's decision noted the Government's failure to produce the alleged Representations and Certifications executed by Ryan, the Government, in its motion for reconsideration, has neither cited to the clause in Ryan's contract that required Ryan to certify regarding prior default terminations nor identified where in the record the alleged Representations

and Certifications executed by Ryan can be found. Suffice to say the best evidence supporting the Government's allegation is the document itself, which has not been shown to exist.

What the Government argues supports its contention that Ryan misrepresented it had not been defaulted in the three years prior to the submission of its bid for contract C-W087 is the testimony of Mr. Michael K. Grady, Ryan's Vice President and project manager. In our original decision we stated that Mr. Grady's cross-examination was insufficient to support a finding that Ryan knowingly misrepresented any prior termination for default (note 19). Upon receipt of the Government's motion we again reviewed Mr. Grady's testimony on this point and can find no reason to reverse our original determination. Although the Government's motion cites to certain answers as proof of Ryan's misrepresentation we note the answers are at best equivocal since Mr. Grady also testified he did not remember whether he executed any such document for this contract and the Government failed to produce the document (tr. 8/198). Mr. Grady's responses in no way rise to the level of proof that Ryan or its authorized representatives executed the Representations and Certifications in the fashion alleged or that the answers were a knowing misrepresentation of the truth.

Having reviewed our decision in light of the Government's motion, we affirm it. The Government's motion for reconsideration is denied.

Dated: 30 October 2000

ALLAN F. ELMORE
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

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

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. 48151, Appeal of The Ryan Company, rendered in conformance with the Board's Charter.

Dated:

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