

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Delta Construction International, Inc.) ASBCA No. 52162
)
Under Contract No. DAJN21-97-D-0004)

APPEARANCE FOR THE APPELLANT: Mr. Mark Goldstein
Treasurer

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
LTC Richard B. O'Keeffe, Jr., JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON APPELLANT'S MOTION FOR RECONSIDERATION

On 5 December 2000, appellant timely moved for reconsideration of the Board's 16 November 2000 decision on the captioned appeal. Appellant requests further clarification with respect to two statements in the last sentence of the opinion that Delta is entitled to recover "the difference between \$200,000 and the \$86,323.07 in orders performed, or \$113,676.93 (finding 12), less the \$11,216.00 payable under Modification No. P00005 (finding 13)." Appellant states that: (1) the delivery orders performed amounted to \$82,970.50, rather than \$86,323.07, and submitted a "table of all disbursements by the Government against this contract" totaling \$88,573.74 and (2) \$11,216 under Modification No. P00005 "was in fact never paid to Delta." Delta further states that it was the prevailing party, meets the eligibility requirements of the Equal Access To Justice Act, and is entitled to reimbursement of its legal expenses.

Respondent's 3 January 2001 reply to the motion: (1) concurs that the Army never paid the \$11,216.00 to Delta under Modification No. P00005, and consents to such clarification to our decision, if appropriate; (2) opposes consideration of appellant's table of disbursements because the record was settled for receipt of further factual evidence on 28 February 2000, and appellant has shown no compelling reason to reopen the record for new evidence; and (3) notes that EAJA reimbursement is premature.

The Board used the word "payable" in the last sentence of the 16 November 2000 opinion because the record did not disclose whether the \$11,216 amount for Modification No. P00005 had been billed by, and paid to, appellant. Since the parties agree that the \$11,216 was not paid, appellant's recovery should be, and is hereby revised to, \$113,676.93 without such deduction.

Delta's contention that "orders in the amount of \$82,970.50 we [sic] issued to Delta" is unsound (app. mot. at 1). First, that figure conflicts with the \$88,573.74 Delta allegedly was paid (see the last line in "table of disbursements" in the motion). Second, the alleged amounts comprising the \$82,970.50 were not substantiated by any Delta invoice or public voucher; the amounts alleged for DOs 1, 3, 11, and 14 were somewhat supported by DO entries (complaint, tabs 1-2), but the alleged payment amounts for the other 14 DOs were wholly unsupported. Third, we know of no valid basis to deduct the three alleged bond payments (of \$3,106.60 + 1,497.96 + 998.64) from the \$88,573.74 amount allegedly paid to Delta. Accordingly, the record evidence does not justify accepting Delta's \$88,573.74 figure, or modifying the Board's figure of \$86,323.07 stated in our original opinion. We agree that appellant's EAJA contentions are premature.

We grant appellant's motion for reconsideration to the extent of the clarifications set forth above, and deny the balance of that motion.

Dated: 10 January 2001

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

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. 52162, Appeal of Delta Construction International, Inc., rendered in conformance with the Board's Charter.

Dated:

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