

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access)
to Justice Act of --)
)
Lasmer Industries, Inc.) ASBCA Nos. 56946, 56966
)
Under Contract No. SPO750-02-D-7917)

APPEARANCES FOR THE APPELLANT: Michael F. Copley, Esq.
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Galloway, OH

APPEARANCES FOR THE GOVERNMENT: Daniel K. Poling, Esq.
DLA Chief Trial Attorney
Matthew O. Geary, Esq.
Senior Counsel
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Columbus, OH

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Lasmer Industries, Inc. (Lasmer) has applied for an award of attorney’s fees and costs under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, as the alleged prevailing party in the captioned appeals. Since the appeals were concluded by a dismissal as moot, and not by a Board decision on the merits or by a Board decision in the nature of a consent judgment, Lasmer is not a prevailing party and the application is denied.

FINDINGS OF FACT

1. The subject of both appeals was a claim by Lasmer (i) for a no-cost termination of a delivery order “because of the impossible specification” and (ii) that government records “be updated to reflect this satisfactory completion of the contract.” *See Lasmer Industries, Inc.*, ASBCA Nos. 56946, 56966, 10-1 BCA ¶ 34,433 at 169,943, finding 9.
2. On 26 April 2010, we denied a government motion to dismiss the appeals as moot because a bilateral contract modification proposed by the government for a no-cost termination did not include the phrase “because of the impossible specification.” We held that absent that phrase, the proposed modification did not provide the full relief

claimed and that Lasmer was accordingly entitled to have the claim of impossible specification heard on the merits. *Id.* at 169,944.

3. Following our 26 April 2010 decision, the contracting officer on 9 August 2010 issued a unilateral contract modification to Lasmer terminating the delivery order at no cost “because of the impossible specification.” The contracting officer also notified Lasmer at the same time that the delivery order was no longer being shown as open in the government’s records. *See Lasmer Industries, Inc.*, ASBCA Nos. 56946, 56966, 11-1 BCA ¶ 34,671 at 170,800, finding 4.

4. On 4 October 2010, the government again moved to dismiss the appeals as moot. We granted the motion in our decision of 20 January 2011. *Id.* at 170,801.

DECISION

To establish that it is a prevailing party for purposes of an EAJA award by this Board, Lasmer must show that there was a Board decision sustaining the appeals or a Board decision in the nature of a consent judgment, providing a material alteration in the legal relationship of the parties. *Lasmer Industries, Inc.*, ASBCA No. 56411, 10-2 BCA ¶ 34,491 at 170,123 citing *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371, 1380 (Fed. Cir. 2002) (prevailing party status requires a “court-ordered change in the legal relationship” of the parties).

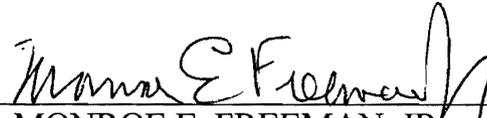
Lasmer contends that it was the prevailing party in our 26 April 2010 decision because “it altered the parties’ status by holding that any [government] remedial measure intended to grant the requested relief must be ‘because of the impossible specification’” (appl. at 5). We disagree. Our decision denying the motion to dismiss did not change the legal status of the parties. It did not require the government to grant any relief. We held only that if the government wanted to “moot” the appeals by granting the claimed relief, it had to grant the full relief claimed. The denial of the motion to dismiss was not a decision on the merits. It allowed the appeals to proceed on the merits – nothing more.

Lasmer also contends that it is a prevailing party as a result of our 20 January 2011 decision dismissing the appeals with prejudice. Lasmer argues that “[b]y determining that [the government’s] no-cost termination indeed gave to Lasmer the requested relief, the Board made a finding in the order that materially altered the legal relationship of the parties” (appl. at 5-6). Again, we disagree. The legal relationship of the parties was changed by the contracting officer on 9 August 2010 (i) voluntarily terminating the delivery order at no cost “because of the impossible specification,” and (ii) assuring Lasmer that the delivery order was no longer shown in the government records as open. These actions of the contracting officer were not required by any Board decision on the merits of Lasmer’s claim or by any Board decision in the nature of a consent judgment.

Since Lasmer has failed to show that it is a prevailing party for purposes of an EAJA award, we need not consider whether it met the financial eligibility requirements for an award or whether the government's position in the appeals was substantially justified.

The application is denied.

Dated: 2 May 2011



MONROE E. FREEMAN, JR.

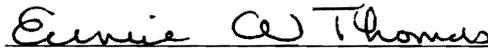
Administrative Judge
Armed Services Board
of Contract Appeals

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 on an application for fees and other expenses incurred in connection with ASBCA Nos. 56946, 56966, Appeals of Lasmer Industries, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals